

405
230

0140

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 172. 83.

CLIMACO CALDERON, APPELLANT,

vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED.

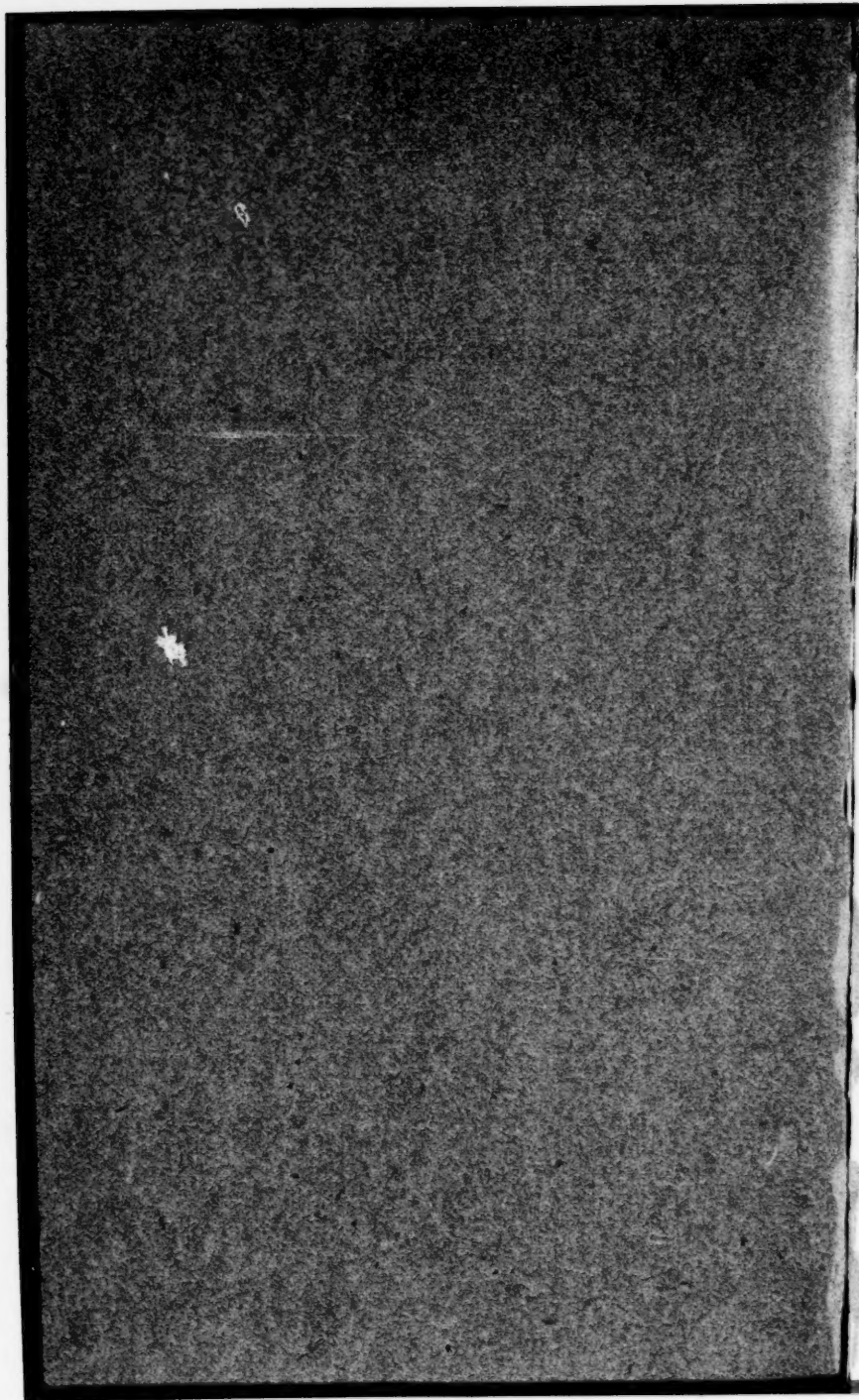
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED NOVEMBER 30, 1898.

CERTIORARI AND RETURN FILED DECEMBER 20, 1898.

(16,096.)

230
15
1150
230
1380



BLEED T

(16,096.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 378

CLIMACO CALDERON, APPELLANT,

vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

| | Original. | Print. |
|---|-----------|--------|
| Transcript from the district court of the United States for the southern district of New York..... | 1 | 1 |
| Statement..... | 1 | 1 |
| Libel..... | 2 | 1 |
| Exhibit A—Bill of lading and contract..... | 4 | 3 |
| Answer..... | 11 | 7 |
| Evidence for libellant..... | 14 | 8 |
| Exhibit 1 offered..... | 14 | 8 |
| Evidence for respondent..... | 15 | 9 |
| Deposition of John W. Morris..... | 15 | 9 |
| John J. Monks..... | 18 | 11 |
| J. H. Thompson..... | 20 | 13 |
| William Long..... | 23 | 16 |
| William Carter..... | 28 | 19 |
| Evidence for libellant..... | 33 | 23 |
| Deposition of Climaco Calderon..... | 33 | 23 |
| Evidence for respondent..... | 34 | 24 |
| Deposition of Albert Haake..... | 34 | 24 |

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 24, 1897.

| | Original. | Print. |
|---|-----------|--------|
| Libellant's Exhibit 1—Bill of lading and contract..... | 36 | 26 |
| Respondent's Exhibit 2—Receipt, July 17, 1893..... | 42 | 30 |
| 3—Receipt, July 19, 1893..... | 42 | 30 |
| Opinion of Brown, J..... | 44 | 31 |
| Final decree..... | 50 | 35 |
| Notice of appeal to United States court of appeals..... | 51 | 36 |
| Assignment of errors..... | 52 | 36 |
| Clerk's certificate..... | 54 | 37 |
| Opinion of Lacombe, J..... | 55 | 37 |
| Dissenting opinion of Wallace, J..... | 57 | 39 |
| Clerk's certificate..... | 63 | 42 |
| Writ of certiorari..... | 64 | 42 |
| Stipulation as to return to writ of certiorari..... | 67 | 43 |
| Clerk's certificate and return..... | 69 | 43 |

1 U. S. District Court, Southern District of New York.

| | |
|--|---|
| CLIMACO CALDERON, Libellant and Appellant, | } |
| <i>vs.</i> | |
| THE ATLAS STEAMSHIP COMPANY, LIMITED, Respondent and | } |
| Appellee. | |

Statement.

1894.

March 2. Libel filed. No process issued.

May 15. Answer filed.

Nov. 13. Cause tried before Hon. Addison Brown, district judge.

Dec. 3. Opinion rendered awarding libellant \$2,900, with interest and costs.

Dec. 31. Final decree entered.

1895.

Jan'y 7. Notice of appeal filed.

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York :

The libel of Climaco Calderon, a citizen of the United States of Colombia, commorant, and doing business in the city of New York, in the southern district of New York, against the Atlas Steamship Company, Limited, a corporation organized and existing under the laws of the Kingdom of Great Britain, in a cause of contract, civil and maritime, alleges and articulately propounds as follows :

First. That heretofore and on or about the 19th day of July, in the year one thousand eight hundred and ninety-three, at the city of New York, this libellant delivered to the said Atlas Steamship Company, Limited, twenty-six bales and three crates of duck uniforms consigned to the minister of war, Bogota, in the United States of Colombia, to be transported by the British steamship *Ailsa*, then lying in the port of New York, to Savanilla, and there to be delivered to the Barranquilla Railway and Pier Co. or their agents, for conveyance to Barranquilla, there to be delivered to the collector of customs, for the consideration or freight of thirty-nine dollars and forty-three cents, which this libellant then and there paid to the said The Atlas Steamship Company and received therefor three bills of lading, receipts and contracts, all of like tenor and date, whereof a copy is hereto annexed marked "A."

Second. That the said steamship *Ailsa* having the goods on board proceeded on her voyage from New York to Savanilla where she arrived in safety, but the said goods and merchandise were not delivered to the agent of the Barranquilla Railway & Pier Co. as agreed, but the said steamship left the said port having the said goods on board and afterwards returned with the same to the port of New York.

3 Third. That the said The Atlas Steamship Company, Limited, did not notify this libellant that the said goods and

merchandise had not been delivered at Savanilla as they should have been, or that the same had been brought back to the port of New York, but without the knowledge of this libellant reshipped said goods and merchandise on board the steamship *Alvo* then bound for Savanilla, which vessel having said goods and merchandise on board afterwards sailed on her intended voyage but never arrived at her port of destination, having been lost on the said voyage with all on board.

Fourth. That by reason of the premises this libellant has sustained damages to the amount of five thousand six hundred dollars.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore this libellant prays that a monition in due form of law according to the course of courts of admiralty, and the rules and practice of this honorable court, in civil causes of admiralty and maritime jurisdiction, may issue against the said Atlas Steamship Company, Limited, and that it may be required to appear and answer on oath this libel and all and singular the matters aforesaid, and if it cannot be found, that its goods and chattels, and if none be found, that its credits and effects in the hands of Pim, Forwood & Co., its agents in the city of New York (being money or claims against third parties in their hands as such agents or due from them, or otherwise), garnishees, may be attached to the amount sued for and costs, and that this honorable court will be pleased to pronounce for the claim of this libellant with costs and
4 interest, and that he may have such other and further relief as in law and justice he may be entitled to receive.

CLIMACO CALDERON.

Subscribed and sworn to before me this 28th day of February, 1894.

[SEAL.]

SIXT CARL KAPFF,
Notary Public, Richmond County.

Certificate filed in N. Y Co.

NORTH, WARD & WAGSTAFF,
Libellant's Proctors.
J. LANGDON WARD, *Advocate.*

(Endorsed:) Libel. Filed March 2nd, 1894.

Atlas Steamship Co. (Limited).

And Barranquilla Railway & Pier Co. (Limited).

Through Bill of Lading from New York to Barranquilla via Savanilla.

Pim, Forwood & Co., agents, 24 State street, New York.

Received, in apparent good order and condition by the Atlas Steamship Company, Lim'd, from Climaco Calderon :

| Marks. | Nos. | Packages. |
|-------------|-------|--------------------------------------|
| Ministerio | | |
| De..... | 1/26, | 26 bales duck uniforms. |
| Guerra | | |
| Bogota..... | 27/9, | 3 crates " " |
| Total..... | 29 | Freight, \$39.43. Packages indse. |

to be transported by the good British steamship *Ailsa*, now lying in the port of New York and bound for Puerto Colombia (Savanilla), or so near thereto as she may safely get with liberty to call at any other port or ports, in any order of rotation, within latitudes $43^{\circ} 10'$ and $6^{\circ} 30' N.$, and longitude 30° and $100^{\circ} W.$, whether in or out of the customary or advertised route, without same being deemed a deviation, whatever may be the reason for calling or entering such port or ports, being marked and numbered as above (weight, quality, contents and value unknown), there to be delivered to the Barranquilla Railway & Pier Co., or their agents, for conveyance to Barranquilla, and to be delivered in like good order and condition, and subject throughout the entire transit and while the goods are in the custody of the carrier to the terms and conditions stated in this bill of lading, which constitutes the contract between the shippers, the Barranquilla Railway & Pier Company, and the Atlas Steamship Company, at the port of Barranquilla, unto Admer Aduacia or to his or their assigns, freight on the said goods to be paid by the shippers, on signing of this bill of lading, at the rates stipulated above, with other charges, if any (and is not to be refunded), vessel or goods lost or not lost. General average payable according to York-Antwerp rules of 1890. All liability of every kind of the Atlas Steamship Company shall cease on delivery of the goods to the Barranquilla Railway & Pier Company.

In accepting this bill of lading the shipper(s) agree(s) that all questions arising under the same shall be construed according to the laws of Great Britain as administered in Great Britain.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the master or agent of the said ship
 6 hath affirmed to 3 bills of lading, all of this tenor and date,
 one of which being accomplished, the others to stand void.
 Dated in New York, this 19 day of July, 1893.

H. WIENER,
For Agent, Severally but not Jointly.

(Endorsed.)

It is mutually agreed that the ship shall have liberty to sail with or without pilots; to carry goods of all kinds, dangerous or otherwise; to tow and assist vessels in all situations; to proceed to the ultimate port of destination via any other port or ports in any order or rotation, whether in or out of the customary or advertised route, and whether such port is in the ordinary course of the voyage beyond the port of the destination of the goods or not, whatever may be the reason for calling at or entering such port or ports, and to deviate for all or any of the above purposes, and with liberty, in the event of the steamer putting back to port of sailing, or into any port, or being otherwise prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail, or in tow of any other vessel, or in any other manner which the ship-owner shall think fit, and to ship or tranship the goods by any other vessel, and with liberty also before shipment, or at any period of the voyage, and so often as may be deemed expedient, or at any port or place to ship the whole or part of the goods by any other steamer, or to tranship or land and store and put into hulk or craft for such time as may be deemed expedient, and thence reship by lighter or otherwise the goods, and to forward them by any other conveyance to the port of destination, extra compensation to be paid for such service; and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by a vessel or vessels of the carrier for the time being, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond its control, by
 7 the perils of the sea, or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor

for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for damage of any kind resulting from fumigation or any other action of sanitary authorities in consequence of quarantine or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and that such goods may be thrown overboard or destroyed at any time without compensation.

8 3. Also, that the carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case of quarantine, the goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch, or should this be impracticable, or the ship not be admitted, the master may proceed on his voyage and land the goods at the nearest safe port (in his opinion) at the risk and expense of the owners of the goods, or retain them on board till ship returns. Quarantine expenses upon the goods, of whatever nature or kind, shall be borne by the owners of the goods, or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore.

5. Also, the master of the vessel has the option of hiring lighters at the port of destination for the landing of the within goods, at the expense and risk of the owners of said goods; and if this in his judgment is inexpedient, the goods to be taken from the ship's tackles, where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in warehouse, on the company's wharf, or sent to the public store, as the authorities at the port of discharge shall direct, and when deposited in the warehouse to be subject to storage and other charges as customary. If by reason of the want or impossibility of obtaining lighters, in the master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on board, and to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignees, and the company shall not be responsible for damage or loss as the consequence thereof.

9 6. Also, that full freight is payable on damaged goods ; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the invoice cost of goods when shipped, and the carrier has the option of replacing the goods at his expense. Notice of any claim arising under this bill of lading must be given by the consignee to the company's agent at the port of destination within 48 hours after the landing of or failure to deliver the goods.

9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise.

10. Also, in case the surf or state of the weather upon the arrival of the steamer shall be such as to render it, in the master's opinion, impracticable to land the goods at the port to which they are destined, they may be retained on board until her return trip, or may be transferred to another steamer at the risk and expense of the owner or consignee of the goods.

11. Also, that the company may land said packages, or any of them, at any intermediate port. In such case it will either place them upon the wharf used by the company, or store them. If placed upon the wharf, all the conditions and agreements of this bill of lading shall be in force while they remain there. If stored, the liability of this company shall cease altogether during said storage.

10 The place of storage does not belong to the company and is not managed by it. When this company shall have delivered said packages or any of them to any other carrier to be transported to their destination, its liability shall cease altogether. This agreement is made with reference and subject to the provisions of the United States Revised Statutes, sections 4281 to 4287, limiting the liability of ship-owners, and to the rules of the United States Supreme Court, made in pursuance thereof.

12. Also, in case of the blockade or interdict of the port of destination, or if without such interdict, the entering of the port of discharge should be considered unsafe, by reason of war or disturbances, the master to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense ; and on the goods being placed in the warehouse, and a letter being put into the post-office addressed to the shipper and consignee, if named, stating the landing, and where deposited, the goods to be at the shipper's and consignee's risk and expense, and the company to be discharged from all responsibility.

13. Also, any duty, tax, or impost, of whatever nature, levied upon the steamer by the authorities at the port of discharge, for or

in connection with the goods herein described, to be paid by the consignees of the goods before delivery.

14. This agreement is made with reference to, and subject to, the provisions of the U. S. carriers' act, approved February 13th, 1893.
PIM, FORWOOD & CO., *Ag'ts*.

11 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York :

The answer of the Atlas Steamship Company, Limited, to the libel of Climaco Calderon, in a cause of contract, civil and maritime.

First. Admits the allegations of the first, second and third articles thereof.

Second. Denies any knowledge or information sufficient to form a belief as to whether libellant has sustained damage to the amount of \$5,600, or any damage, and leaves him to his proof respecting the same.

Third. Denies that all and singular the premises are true, but admits they are within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Fourth. And further answering herein, respondent alleges, that as libellant well knew the steamer *Ailsa* and the other steamers run and managed by this respondent in the course of their regular voyages touch at many different ports, and that it is often impracticable to deliver at each port in regular order the parcels or packages consigned to that port; that in and by the bill of lading annexed to the libel herein it was agreed between this libellant and the respondent that in the event of the officers of said ship being unable to find the whole or a portion of said goods during the vessel's stay at the port of destination, the carrier should be at liberty to forward the goods at the first opportunity, when found, at the carrier's expense, the vessel not to be held liable for any claim for delay or otherwise.

Fifth. Upon the arrival of said *Ailsa* at the port of Savanilla the officers in charge were unable to find said cargo, and were
12 unable to find the same until shortly before said steamer's arrival at New York, whereupon and within twenty-four hours after said steamer's arrival the same was forwarded as agreed by the steamship *Atleo*, being the first steamer sailing for Savanilla by which said goods could be forwarded.

Sixth. That the said loss was occasioned solely by a peril of the sea, and was in nowise occasioned or contributed to by the negligence of this respondent or its agents or servants.

Seventh. And further answering respondent alleges that in and by said bills of lading referred to, it was mutually agreed in the event of any loss whatsoever this respondent should not be liable for goods of any description above the value of one hundred dollars a package, unless bills of lading were signed therefor, with the value therein expressed, and a special agreement made. That no value was stated in the bills of lading herein, and no special agree-

ment was made with reference to the value of said goods; that the number of packages alleged by libellant to have been lost was twenty-nine; that this respondent prays that in the event that this honorable court would be pleased to decree that the loss complained of was occasioned by its negligence, that proof of value of said goods shall not be received beyond the sum of one hundred dollars a package.

Wherefore respondent prays that this honorable court would be pleased to dismiss the libel herein with costs.

WHEELER & CORTIS,

Proctors for Respondent, 45 William St., N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, ss:

Henry Grey Kellock, being duly sworn, deposes and says: That he is the duly authorized attorney-in-fact in the city of New York of the defendant in the above-entitled action, and that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by said defendant is that it is a foreign corporation, and not within said city and county, and capable of making this affidavit; and that the sources of deponent's knowledge and the grounds of his belief respecting the allegations of said answer are derived from his relations to the said defendant as such attorney as aforesaid, and from conduct of, and familiarity with, its business and affairs in said city.

H. G. KELLOCK.

Subscribed and sworn to this 15th day of May, 1894, before me—
[SEAL.]

JAS. MOORE,

Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed :) Answer. Filed May 15th, 1894.

14 United States District Court, Southern District of New York.

CLIMACO CALDERON

vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED.

} Before Hon. Addison
Brown, Judge.

NEW YORK, November 13, 1894.

Appearances:

Messrs. North, Ward & Wagstaff (Mr. Ward) for the libellant.
Messrs. Wheeler & Cortis (Mr. Wheeler) for the respondent.

The claims of the libel and answer are stated.

Mr. Ward offers in evidence the bill of lading which is marked
Ex. 1 of this date.

Libellant rests.

- 15 Depositions of John W. Morris and John J. Monks, for the respondent, read in evidence.

United States District Court, Southern District of New York.

CLIMACO CALDERON

vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED. }

NEW YORK, November 2d, 1894.

Present: Mr. Ward, for libellant; Mr. Cortis, for respondent.

JOHN W. MORRIS, being duly sworn and examined as a witness for the respondent, testified:

By Mr. CORTIS:

Q. You are the captain of the steamship *Ailsa*, belonging to the Atlas Steamship Company?

A. Yes.

Q. How long have you been captain of the *Ailsa*?

A. Six years.

Q. Were you the captain of the *Ailsa* on the voyage from New York beginning in July, 1893?

A. Yes.

Q. For what ports was the *Ailsa* bound?

A. We went to Kingston, Savanilla, Carthageua and Limon.

Q. And from Port Limon?

A. New York.

Q. Did you stop at all of those ports that you have mentioned?

A. Yes.

Q. Was it reported to you at any time during that voyage that a portion of the cargo which was on the ship's manifest to be delivered at a designated port had not been delivered at that port?

A. Yes.

Q. For what port was the cargo destined?

A. It was shipped to Savanilla.

Q. Do you recollect what the cargo was?

- 16 A. I couldn't tell you what was in it; I only know that it was some cases.

Q. How many cases?

A. I don't remember how many.

Q. When and where was that reported to you and by whom?

A. At Carthageua, by the purser.

Q. Had the ship left Savanilla at the time this was reported to you?

A. Yes.

Q. Did the purser report to you whether or no the cargo had subsequently been found?

Objected to as immaterial.

Q. Did the purser report to you that this parcel was on board at the time he made the report?

A. When he made the report he reported to me that we had some cargo that ought to have been landed at Savanilla.

Q. Did he state any reason why that cargo had not been landed at Savanilla?

Objected to as immaterial.

A. Yes.

Q. What reason did he state?

Objected to as incompetent.

A. That it was stowed amongst the Carthagena cargo.

Q. What orders, if any, did you give as to the delivery of the cargo after this report?

Same objection.

A. I consulted with him as to what was the best thing to be done, and we came to the conclusion that the best way to get it delivered was to take it back to New York and ship it in the next ship going south.

Q. Did you ship it at New York?

A. We did.

Q. Why did you not deliver it at Carthagena?

A. Because I believe the law does not allow us to land any cargo that is not on the manifest, and also because there is very
17 little communication with Carthagena from Savanilla by sea ; there is communication by the river steamers, and at that time, to the best of my recollection, the river steamers were not running because the Dickie was dry and the steamers couldn't run.

Q. How much delay would it have caused your ship if you had returned when you discovered the cargo was on board and delivered it at Savanilla?

A. We couldn't have returned until we had discharged our cargo at Carthagena, and then it would have taken us at least a day to have gone back to Savanilla.

Q. What was the nature of the cargo remaining on board after discharging at Carthagena?

A. The cargo remaining on board then was homeward cargo, consisting of coffee, hides, etc., but we were timed to be at Limon at a certain day to take up a perishable cargo that was waiting, and that was one reason why we couldn't go back to Savanilla.

Q. What was done with the cargo, the cases you have referred to as having been shipped to Savanilla, when the ship returned to New York, if you know?

A. To the best of my belief it was taken on by the first ship going to Savanilla, transhipped.

Q. Do you know the name of the ship to which it was transferred?

A. I think it was the *Alco*; she was the ship going out as we came in to New York at that time.

Q. What time did you arrive at your dock?

A. We arrived at the dock about ten o'clock in the morning.

THE ATLAS STEAMSHIP COMPANY, LIMITED.

Q. Do you recollect how soon after the *Alvo* sailed?

A. About three o'clock that afternoon.

Cross-examined by Mr. WARD:

Q. Have you a regular sailing time of day?

A. Yes.

Q. What time?

A. Twelve o'clock, or as soon after as the ship is ready.

Q. Do you remember what time you sailed on this voyage?

A. We sailed?

Q. Yes.

A. I don't recollect. I think it must have been about two or three o'clock.

18 JOHN J. MONKS, being duly sworn and examined as a witness for the respondent, testified:

By Mr. CORTIS:

Q. Mr. Monks, you are the purser of the steamship *Ailsa*, belonging to the Atlas Steamship Company, Limited?

A. I am.

Q. How long have you been purser?

A. About four years more or less.

Q. Were you the purser on the *Ailsa* in July, 1893, on a voyage from New York?

A. I was.

Q. Was it any part of your duty to supervise the discharging of the cargo in the various ports at which the *Ailsa* stopped after leaving New York?

A. It was and it is.

Q. Was there any cargo on board on that voyage which was not delivered at the port to which it was consigned?

A. There was.

Q. State in your own way the nature of the cargo and the port to which it was consigned.

A. There was a lot of packages, cases and bales—a lot of 29, numbered, I think, from 1 to 29—if I recollect correctly. The contents, I am given to understand, were uniforms—Government uniforms—destined for Savanilla.

Q. Do you know the reason why that cargo was not delivered at Savanilla?

A. For the reason that it was found after leaving Savanilla mixed in among the Carthage cargo at Carthage.

Q. When and how did you first discover that there was a short delivery at Savanilla?

A. After leaving there and going through the cargo books, which is my custom, I found this lot of goods—that not even a single package had been tallied out.

Q. Was this a part, or the whole of the consignment?

A. The whole of that particular lot. There were two lots, I think;

the complete shipment was 42 or 43 packages, but this was a single lot of 29 packages; part of the shipment.

Q. In what hold of the ship was the Savanilla cargo stowed?

A. Nos. 4 and 5.

19 Q. Was any other cargo stowed in those holds?

A. And 3, if I recollect.

Q. Was any other cargo stowed in those holds?

A. There was.

Q. Did you become aware while the vessel was at Savanilla that this cargo was not delivered?

A. No, sir.

Q. When did you first become aware of it, how long after leaving Savanilla?

A. That same afternoon, I think, if I recollect rightly, we left there at 12 o'clock, and it must have been an hour, or two hours, previous to arrival at Carthagena.

Q. When was that cargo discovered?

A. It was discovered within an hour of the discharge of the Carthagena cargo.

Q. An hour before or after?

A. Before.

Q. Where was it?

A. It was in No. 3 hatch where the Carthagena cargo was stowed, mixed with it in the last tier.

Q. What did you do upon discovering this cargo?

A. I reported at once to the captain.

Cross-examined by Mr. WARD:

Q. When you say the last tier, what do you mean—do you mean the last of the cargo that is put into the ship?

A. No, the first that is put in the ship and the last to come out.

Q. Did you see it there?

A. I saw it there; the moment it was reported to me I went down and saw it, and I came up and reported to the captain; it was reported to me by the third officer, who checks out that cargo; my place is in the after hold, his place is in the forward hold. I came down and saw that it was the cargo consigned to Savanilla.

Q. How long was that after leaving Savanilla?

— — —

Q. About 24 hours' run?

A. No, it was not that; you see it takes—the distance is 76 miles—we got there that evening, and we didn't commence to discharge cargo until the next morning, and it was the morning after that.

20 Q. Do you have anything to do with the loading of the ship?

A. Nothing whatever, sir.

Q. You don't have anything to do with checking the goods as they come in?

A. No, sir.

Q. Who does?

A. It is done at New York, on the dock.

Q. So that you don't know whether the goods are on board the ship or not?

A. We don't know what is in the ship until the goods are discharged.

Q. Haven't you a book on board?

A. Yes.

Q. You have copies of bills of lading?

A. We have the ship's copies of bills of lading.

Q. That is what you meant when you said you looked over the cargo book?

A. As made out by me from the bills of lading; those cargo books are used to check the cargo out, which is the only guarantee that the company has that the cargo has left the ship.

Q. In checking out cargo do you have your book arranged by ports?

A. We have books for every port; there are four books made out for every port.

Q. Delivery books?

A. Or check books.

Q. So on each book would appear the cargo for each port?

A. Yes, sir.

J. H. THOMPSON, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. WHEELER:

Q. What is your business?

A. I am the correspondent and claim clerk of the Atlas line.

Q. How long have you been in their employ?

A. Fourteen years nearly; fourteen years since I first joined the company in Liverpool.

Q. Have you during that time been acquainted with their steamers and the various routes they have taken?

A. Yes, sir, for eight years.

Q. Do you know this route from New York to Savanilla and Carthagen and Port Limon?

A. Yes, sir.

Q. How long have your vessels been running on that route?

A. The schedule varies at different times; I don't know exactly how long that particular route was running.

Q. Several years?

A. Yes; they are changed now and again, according to circumstances; as the trade demands.

Q. As I understand you, your steamers have various routes, they don't all go on this route to Carthagen and Savanilla?

A. No.

Q. What I want to get at is whether you have been running steamers on that route for several years?

A. From what I remember I think that that particular schedule was running for about three years.

Q. On that route do you carry anything besides cargo?

A. Passengers, specie and mails.

Q. Is the usual course of that route, as described by the captain, first to Kingston, then to Savanilla, then to Carthagena and Port Limon and then back to New York direct?

A. Yes.

Q. Do you know the libellant, Climaco Calderon?

A. Yes.

Q. What is his position in New York?

A. Consul general of the Republic of Colombia.

Q. How long has he been the consul general?

A. Three years or four years, or more.

Q. During that time state whether he has been in the habit of shipping goods by your line to Savanilla.

A. Yes, he has made some shipments.

Q. In making those shipments during this period of three or four years, has the same form of bills of lading been delivered to him that is in evidence in this case?

A. Yes, he must have had his shipments signed on that form on several occasions.

Q. State whether or not, during that time, that has been the form in use on the line, for shipments on that route.

A. Yes.

By the COURT:

Q. How many times can you say he has shipped goods under similar bills of lading?

22 A. I should say ten times probably, at least; that is a point that I couldn't answer exactly.

Q. There have been several?

A. Yes, sir.

By Mr. WHEELER:

Q. Was any special agreement made between him and the company as to the value of these cases of uniforms which were shipped on the *Ailsa*?

A. Not to my knowledge.

Q. It would have been part of your business to know of it if it had been made?

A. Not at the time it was made; but it would have come under my notice afterwards.

Q. When did you first learn that these goods that were shipped had been returned?

A. On the morning of the *Ailsa's* arrival.

Q. What did the company do with them?

A. Transhipped them at once to the *Alvo*, which was loading on the other side of the dock and sailing the same day.

Q. Do you remember the date?

A. It was the 16th of August, 1893.

Q. Was the *Alvo* ever heard from after she sailed with those goods on board?

A. There was a report made by the captain of the brig or schooner by the name of *James Holden*; he saw her on the morning of the 20th of August; then she was in the hurricane, which was coming on with great force.

By the COURT:

Q. She was seen at the time of the hurricane?

A. I believe the ship was already in it at the time.

Q. She was reported as seen August 20th in the hurricane?

A. I am not perfectly certain; but I think it was.

By Mr. WHEELER:

Q. Was she ever heard from after that?

A. Never to my knowledge.

By the COURT:

Q. Where was she when reported?

A. I don't know the exact distance; probably 800 or 900 miles south of New York.

23 By Mr. WHEELER:

Q. What port did she sail for?

A. For Gonaives in Hayti; the first port was — island to take on laborers, and from there to Gonaives in Hayti.

Q. And from there to Savanilla?

A. There has been a little mistake in the vessel. She didn't go to Kingston this voyage; I mean previously, I think there was a mistake you know in saying Kingston instead of saying these ports in Hayti.

Q. So that the usual route on this Savanilla and Carthagena route was for Hayti ports?

A. At that time it was; now we go via Kingston; I was mixed up.

Q. Then when she sailed from New York on the 16th you said that she was first to touch at Gonaives, then to a port in Hayti, and was she bound from there for Savanilla and Carthagena?

A. After calling at one or more other ports in Hayti.

Q. And at Savanilla she was to deliver these cases of goods?

A. Exactly.

Q. Was there any wreckage or boat picked up—

The libellant admits that the *Alvo* was lost at sea at that time before she arrived at Savanilla and in this hurricane.

Cross-examined by Mr. WARD:

Q. Do you remember what time of day the *Ailsa* sailed in July?

A. I don't remember the exact time.

WILLIAM LONG, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. WHEELER:

Q. What is your profession?

A. Captain of an Atlas steamer.

Q. How long have you been a sea captain?

A. Six months.

Q. How long have you followed the sea?

A. Fourteen years altogether.

24 Q. Have you ever sailed on these two steamers that have been mentioned in this case?

A. On both of them.

Q. How long before the ~~Atlas~~ ^{Loro} was lost; that is to say, in August, 1893, had you seen her?

A. Perhaps three or four months.

Q. How large a vessel was she?

A. About 2,000 tons as near as I know.

Q. What was her general condition as to seaworthiness when you saw her last?

A. Very good as far as I could see.

Q. Have you sailed in Atlas steamers in this route from New York to Savanilla, and Cartagena, and back to New York?

A. Yes, sir.

Q. So you know the route?

A. Oh, yes, very well.

Q. Do you know the harbor of Savanilla?

A. Yes, sir.

Q. Did you know it in July, 1893?

A. I was there in either April or May, I don't know which.

Q. What was the customary way during 1893 and previous years, of delivering cargo from the Atlas steamers at the port of Savanilla?

Objected to as immaterial; objection overruled.

A. Into lighters that were towed alongside the ship; the ship was at anchor about a mile and a half from the place where the lighter was taken to.

Q. What facilities were there other than those you have mentioned at that time for delivering cargo at that port?

A. No others at all.

Q. What sort of a harbor was it as to being exposed to the weather?

A. Very rough water there sometimes.

Q. What wind?

A. To the southwest; but a very heavy swell came in there and ships had to get out in a hurry.

Q. Would it have been practicable for the *Ailsa*, on her voyage in 1893, to have unloaded all her cargo into lighters in order to find her missing goods?

Objected to. Objection overruled.

25 A. No, sir.

THE ATLAS STEAMSHIP COMPANY, LIMITED.

By the COURT:

Q. Why not?

A. Because there is only a few lighters there and you load the lighters as quick as you can and they are towed to shore and anchored there to give time for the unloading of the lighters onto the old wharf that is there, and sometimes you have—you wait a whole day before you can get an empty lighter; in fact they wouldn't have lighters enough to hold all the cargoes.

Q. What are the customary return cargoes on your steamers on that route in the summer time?

A. Coal, hides, rubber and balsam.

Q. Any fruit?

A. No fruit from that port.

Q. But from the other ports?

A. Yes; from Limon.

Q. Fruit would be perishable?

A. Very perishable.

By Mr. WHEELER:

Q. What kind of fruit?

A. Bananas.

Q. Do you have regular sailing days on which you are advertised to sail from different ports on that route?

A. Yes, sir.

Q. State whether or not, from the character of the trade, it is important to be punctual in those sailings?

A. Yes, very much so, because of the fruit.

Q. Because of the fruit? You mean because the fruit might be decayed?

A. Yes, sir.

Cross-examined by Mr. WARD:

Q. When were you at Savanilla last?

A. About three months ago.

Q. Did you discharge your cargo into lighters then?

A. No, sir; at a wharf.

Q. There is a wharf now built there?

A. Yes, sir.

Q. Have you been to Savanilla between April, 1893, and this time that you mention?

A. Yes, sir; two or three times.

By the COURT:

Q. How much draft of water have they at that wharf?

A. About 23 feet, I think.

26 Q. How far out does it run?

A. I believe the wharf is 4,000 feet long.

By Mr. WARD:

Q. Steamers of your line now discharge at the wharf?

A. Yes, sir.

Q. When do you say that you were there next after April, 1893?

A. November or December; I am not sure.

Q. What ship were you on then?

A. The *Ailsa*.

Q. Did you discharge at the wharf then?

A. Yes, sir.

Q. When you were there in April, 1893, was the wharf in process of construction?

A. Yes, sir.

Q. Are you able to say that it was not completed so that vessels could land their cargo there in July, 1893?

A. No, sir.

Q. You are not able to say?

A. No sir, I was in England.

Q. So you don't know; you are not able to testify now that the *Ailsa* might have landed her cargo from lighters in July or August, 1893?

A. No, sir.

Q. How long is the voyage from here to Savanilla?

A. About 18 days.

Q. So that a vessel leaving here on the 13th of July would normally get to Savanilla about the last day of July or the first day of August?

A. Yes, sir.

Q. You say you are now master of one of the vessels of the Atlas Steamship Company?

A. Yes, sir.

Q. It is the custom to have a manifest of the cargo, is it not?

A. Yes, sir.

Q. You have to have a manifest of your cargo before you can clear?

A. Yes, sir.

Q. And after the cargo is on board and the manifest is made out you go to the custom-house, or somebody does, and gets a clearance?

A. Yes, sir.

Q. The master usually goes himself?

A. Yes, sir.

Q. How long are steamers in port usually here?

A. Seven days or eight days.

Q. And about half of that time is used up in loading?

A. Yes, sir.

27 Q. And cargo is loaded in the order in which it is received?

A. I don't know, sir.

Q. Do you usually take cargo on board the last day of sailing?

A. Yes, sir; I have seen cargo go on board in the morning.

Q. Would that cargo be down at the bottom of the ship in loading?

A. It all depends on how much is in the ship.

Q. But I mean cargo that is taken on board on the day that you sail, would that be naturally and normally down in the bottom of the ship?

A. Oh, no.

Q. That would be on top?

A. Yes, sir.

Q. Are you familiar with the construction of the *Ailsa*?

A. Yes, sir.

Q. You sailed on her at one time?

A. Yes, sir.

Q. Mr. Monks speaks of Nos. 3, 4 and 5 holds; explain what is No. 3, what No. 4 and what No. 5 hold?

A. The engines on the *Ailsa* are in the centre of the ship, No. 1, No. 2 and No. 3 are on the fore part of the engines, No. 4 and No. 5 are on the after part of the engines.

By the COURT :

Q. No. 3 is next the engine bulkhead?

A. Yes, sir.

By Mr. WARD :

Q. How many decks has she?

A. Two cargo decks.

Q. When you speak of the forward hold, it runs fore and aft from the engine bulkhead?

A. No, there is a bulkhead between; either one or two, I forget which.

Q. Are there two decks in each hold?

A. Yes, sir.

Q. Can you give me the size of No. 3 hold, about how big it is?

A. No, sir; I couldn't say.

Q. No. 3 hold is entered from No. 3 hatch?

A. Yes, sir.

Q. And where is No. 3 hatch with reference to the bulkhead; that is, what is the distance from No. 3 hatch to the forward bulkhead of the engine-room?

A. Perhaps 25 or 30 feet.

28 Redirect examination by Mr. WHEELER :

Q. What is the beam of the *Ailsa*?

A. I don't know exactly.

Q. Well, about?

A. About 35 feet, I think.

Q. And about how long fore and aft was this No. 3 hold?

A. Perhaps 40 feet.

Q. So there would be a space in each of the cargo decks of 40 by 30?

A. Yes, sir.

WILLIAM CARTER, being duly sworn and examined as a witness for the respondent, testifies :

By Mr. WHEELER :

Q. What is your business?

A. Stevedore.

Q. How long have you been in that business?

A. Thirty years.

Q. Where?

A. New York.

Q. Did you load the steamship *Ailsa* in July, 1893?

A. Yes, sir.

Q. Do you remember whether or not at the time she sailed the hold in which the Savanilla freight was stowed was filled?

A. These hatches were full.

Q. How about the Cartagena hold?

A. The Cartagena hold was the same manner.

Q. Was your attention drawn afterwards to the fact that there were 29 bales or crates that were to have been delivered at Savanilla, and, in fact, had got in with the Cartagena freight?

A. After the ship arrived back.

Q. Did you make any investigation into that?

A. I did, as far as my foreman is concerned; he said that he went down there but they weren't aware that they put them with the Cartagena cargo.

Q. Can you tell at what time those goods were delivered at the pier.

A. I couldn't say.

Q. Can you tell how long they were delivered before the vessel sailed?

A. Really I couldn't say; they were received on the wharf and piled up and they took them up according to their rotation of the course the ship goes.

29 Q. But I understood you to say that you do remember that when the ship sailed the holds containing the ~~fruit~~ ^{cargo} for Savanilla were full?

A. Yes, sir.

Cross-examined by Mr. WARD:

Q. You don't mean to be understood as saying that all the Savanilla cargo was stowed in one hold, do you?

A. No, sir.

Q. The purser has testified that the Savanilla cargo was stowed in Nos. 3, 4 and 5 holds; do you know about that?

A. Yes, sir.

By Mr. WHEELER:

Q. In my question to you on direct examination I asked you if when the ship sailed the hold in which the Savanilla cargo was stowed was full, and you said yes. I should have asked you if the holds in which the cargo was stowed were full; do you make the same answer as to the holds that you did when I asked you before in the singular form?

A. Yes, sir; but not filled with all Savanilla cargo.

Q. Can you tell which of them were filled with Savanilla cargo, if any?

A. Not one of them to my knowledge.

Q. Do I understand you to say that in stowing the ship there was cargo for other places than Savanilla that was put in the same holds with the Savanilla cargo?

A. Yes, sir.

Q. What was the reason of that?

A. We have to do that to equalize the trim of the ship from port to port.

By Mr. WARD:

Q. It is almost invariable?

A. Yes, sir.

Q. Tell me about how much time you ordinarily consume in loading these vessels.

A. From 15 to 20 hours.

Q. What proportion of the cargo is ordinarily put on board on the sailing day?

A. We put principally the first ports, but sometimes we get little short shipments of goods that can't be found in transit, and those we put aboard last.

Q. As a rule the cargo for the first ports is put on board the last day?

A. Oh, yes; we take cargo for other ports the last day.

Q. What proportion of the ship's cargo would be usually taken on the sailing day?

A. General cargo, all grades of goods.

Q. Half or two-thirds?

A. Probably 500 barrels, or 200, or 1,000 barrels sometimes. Sometimes we have a quantity of fish that comes there that amounts to 2,500 barrels in some places, and that don't arrive until the morning of sailing.

Q. Do you remember the ship *Ailsa* when she sailed the 13th day of July how much cargo you put on board the last day?

A. That I couldn't answer.

Q. Do you know whether the ship had been practically loaded before the last day or not?

A. She was practically I guess before the last day.

Q. Do you remember about No. 3 hold, whether it would be natural for cargo to be found up against the bulkhead in No. 3 hold that came down to the ship an hour or two before she sailed?

A. Very likely, we would fill up the hatch.

Q. Fill up the whole hold?

A. Yes, sir.

Q. Within two or three hours of the ship's sailing?

A. Yes, sir.

Q. Fill up the whole hold?

A. Oh, not the whole hold.

By Mr. WARD:

Q. That couldn't happen with cargo that came down just before the sailing, could it?

A. It may probably happen; we have several ports to put in the morning of sailing.

By the COURT:

Q. Is it probable that there would be cargo put in at the bottom of the hold on the morning of sailing?

A. We have the hold open, we have to reserve places for what we call wet goods, pickled fish and pickled pork, &c.

31 Q. Do you usually have the entire hold empty in No. 3 up to the morning of sailing?

A. Oh, no, sir.

Q. I understand the purser to say that this was found in the lower tier in No. 3 hold, and I want to know if it was a common thing that No. 3 hold would be open and untirely unfilled, so that on the morning of the day of sailing the cargo could be put in?

A. Yes, sir, the cargo could be put in there the morning of sailing.

Q. Is it a common thing that that hold would be entirely empty?

A. If we are notified that we have such kinds of goods coming we fill around the hatches and keep a place for the goods in question.

Q. About dry goods; now would those goods be likely to be stowed in the bottom of tier No. 3 hold if they were received on the last day of sailing?

A. It might be possible that those goods were put in there, we have got all grades of goods in the lower holds of those ships.

By Mr. WARD:

Q. What I want to get at is this: In loading the ship you put in ordinary—the first cargo that you put in down at the bottom of the ship, unless you have special notice that some particular kinds of wet and heavy goods are coming and you are to reserve a place for them, in that case you reserve a place and fill up the hatches?

A. Yes, sir.

Q. Now, the ordinary way of loading the ship is to take the cargo as it comes, putting the heavy and wet cargo in the lower hold and building up so as to distribute your weight properly, and when you get up to the first deck, then as the goods come in, being dry goods, you set those up against the bulkheads; what I want to know is whether under ordinary circumstances the No. 3 hold would be so empty on the morning of the day of sailing that light goods coming down on that day would be stowed in the lower tier in that hold, way up against the bulkhead in the back part of the ship?

A. It could be.

Q. But would it be normally?

A. Yes, sir.

32 Q. You usually do it?

A. Yes, sir.

Q. Ordinarily goods coming down on the last day before the ship sails are put down at the bottom of the ship?

A. We reserve a place for all grades of packages.

Q. Do you reserve it when you haven't got any notice?

A. We have them as a rule on the pier.

Q. And then you take them out on the pier?

A. Yes, sir.

Q. How can you do that if they don't get there till two or three hours before the ship sails?

A. We take them where they do come, it is a question for what ports they are designated.

Q. And you wouldn't stow Savanilla goods in the lower tier of the lower hold?

A. Yes, sir.

Q. Is that the ordinary way of stowing them?

A. Oh, yes.

Q. Any difficulty in getting them when you get there?

A. It might be, you can't tell; if they happen to get mixed we have to move some of them to find them.

By Mr. WHEELER:

Q. Do I understand you to say that your method of loading these ships is as far — possible to put each kind of goods by themselves?

A. Yes, sir.

Q. So that the dry goods and the wet goods would go in different compartments and so on?

A. Yes, sir.

Q. So the stowage is made more with reference to the quality of the goods than with reference to the port of destination?

A. Yes, sir.

Respondent rests, except as to certain dates.

33 CLIMACO CALDERON, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. WARD:

Q. You are the libellant?

A. Yes, sir.

Q. Do you remember the day and the time of day when these goods for which we bring this libel were shipped, delivered at the pier of the Atlas Steamship Company?

A. Yes, sir; I remember it very well.

Q. What was the day?

A. The 19th of July.

Q. The day the ship sailed?

A. Yes, sir.

Q. Have you any recollection of the time?

A. Yes, sir; I remember very well that that morning about half past nine a boy came to me saying that they wanted to have a shipping permit from the Atlas Steamship Company.

Mr. WARD: I have given my friends notice to produce the shipping permit and they tell me that they haven't it.

(Answer continued.) I said they don't use to give ordinary permits on the sailing day; I went downstairs to the office because I had my office in the same building, and saw Mr. Frank Earl, the clerk who gives the permits, and he gave me a special permit, which is customary; I remember very well that he gave me a permit to have those goods delivered at the pier not later than one o'clock.

Q. For the *Ailsa*?

A. Yes, sir.

By Mr. WARD:

Q. What did you do with the permit?

A. I gave the permit to the boy and he took it to the cartmen and they went down to the pier of the steamer and they sent the shipping receipt to me.

Q. You surrendered the permit and got the bill of lading?

A. I surrendered the shipping receipts and they gave me the bill of lading signed.

By Mr. WHEELER:

34 Q. What time did you get the bill of lading that day?

A. It was before—I remember very well this, I got those bills of lading signed not later than one o'clock, something like that.

Q. Did you forward one of them by the mail on that steamer?

A. Yes, sir.

Q. I notice there are 29 packages, 26 bales and 6 crates—were they of about equal value?

A. I think about the same.

Testimony closed.

U. S. District Court, Southern District of New York.

CLIMACO CALDERON

against

THE ATLAS STEAMSHIP COMPANY, LIMITED. }

Testimony of Albert Haake, a witness on behalf of respondent, taken pursuant to stipulation, before James Moore, notary public, at 45 William street, New York, November 22d, 1894.

Present: Mr. J. Langdon Ward (North, Ward & Wagstaff) for libellant; Mr. John S. Woodruff (Wheeler & Cortis) for respondent.

Mr. WOODRUFF: I offer in evidence the shipping receipt and shipping permit.

Received and marked Exhibits 3 and 2 respectively of this date.

The witness having been duly sworn, testified as follows:

Direct examination by Mr. WOODRUFF:

Q. What is your occupation?

A. I am foreman for Mr. Carter, the stevedore on the *Atlas* dock.

35 Q. Were you employed on the *Atlas* dock in July, 1892?

A. Yes.

Q. You were at work there at the time of the *Ailsa's* departure in that month?

A. Yes.

Q. Do you remember anything in connection with the receipt of a consignment of goods?

A. I don't know anything about the receipts; the goods arrived just shortly before the ship went away.

Q. On the same day of the sailing?

A. Yes, between 11 and 12 o'clock.

Q. In the morning?

A. Forenoon, yes.

Q. These were the 29 cases that were consigned by Mr. Calderon to *Savanilla*?

A. Yes.

Q. Do you know where those goods were put?

A. No. 3 hatch.

Q. Were they put in with other goods consigned to *Savanilla*?

A. No, there was only a little bit of cargo—for *Carthagena*. It was at the last minute.

Q. The other cargo in that hold was consigned to *Carthagena*?

A. Yes.

Q. Why was it put in that hold?

A. Because we had no other place to put it but that place.

Q. At the time the cargo was received then you say you put it in that hatch because that was the only place to put it?

A. Yes.

Cross-examination by Mr. WARD:

Q. You don't mean to say there was no other *Savanilla* cargo?

A. Down below the ship was full, it was just the last minute.

Q. There was other *Savanilla* cargo in No. 3 hold?

A. No, sir; not in No. 3, in No. 1 and in No. 5. At the last moment the ship just going out, those goods had to be put in a special place; we can't put them where the people can go through them. That wouldn't do.

Q. How many goods were there loaded on board after these goods?

A. None.

Q. They were the last goods put in?

A. Yes, sir.

Ex. 1, Nov. 13, '94.

Atlas Steamship Co. (Limited).

And Barranquilla Railway & Pier Co. (Limited).

Through Bill of Lading from New York to Barranquilla via Savanilla.

Pim, Forwood & Co., agents, 24 State street, New York.

Received, in apparent good order and condition by the Atlas Steamship Company, Lim'd, from Climaco Calderon :

| Marks. | No. | Packages. |
|-------------|-------|-------------------------------------|
| Ministerio | | |
| De..... | 1/26, | 26 bales duck uniforms. |
| Guerra | | |
| Bogota..... | 27/9, | 3 crates " " |
| Total..... | 29 | Freight, \$39.43. Packages mdse. |

to be transported by the good British steamship *Ailsa*, now lying in the port of New York, and bound for Puerto, Colombia (Savanilla), or so near thereto as she may safely get, with liberty to call at any other port or ports, in any order of rotation, within latitudes 43° 10' and 6° 30' N., and longitudes 30° and 100° W., whether in or out of the customary or advertised route, without same being deemed a deviation, whatever may be the reason for calling or entering such port or ports, being marked and numbered as above (weight, quality, contents, and value known), there to be delivered to the Barranquilla Railway & Pier Co., or their agents, for conveyance to Barranquilla, and to be delivered in like good order and condition, and subject throughout the entire transit, and while the goods are in the custody of the carrier to the terms and conditions stated in this bill of lading, which constitutes the contract between the shippers, the Barranquilla Railway and Pier

Company, and the Atlas Steamship Company, at the port of
 37 Barranquilla, unto Admer Aduacia, or to his or their assigns, freight on the said goods to be paid by the shippers, on signing of this bill of lading, at the rates stipulated above, with other charges, if any (and is not to be refunded), vessel or goods lost or not lost. General average payable according to York-Antwerp rules of 1890. All liability of every kind of the Atlas Steamship Company shall cease on delivery of the goods to the Barranquilla Railway & Pier Company.

In accepting this bill of lading the shipper(s) agree(s) that all questions arising under the same shall be construed according to the laws of Great Britain as administered in Great Britain.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading

agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the master or agent of the said ship hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in New York, this 19 day of July, 1893.

H. WIENER,

For Agent, Severally but not Jointly.

(Endorsed.)

It is mutually agreed that the ship shall have liberty to sail with or without pilots; to carry goods of all kinds, dangerous or otherwise; to tow and assist vessels in all situations; to proceed to the ultimate port of destination via any other port or ports in any order or rotation, whether in or out of the customary or advertised route, and whether such port is in the ordinary course of the voyage beyond the port of the destination of the goods or not, whatever may be the reason for calling at or entering such port or ports, and to deviate for all or any of the above purposes, and with liberty, in the event of the steamer putting back to port of sailing, or into any
38 port, or being otherwise prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail, or in tow of any other vessel, or in any other manner which the ship-owner shall think fit, and to ship or tranship the goods by any other vessel, and with liberty also before shipment, or at any period of the voyage, and so often as may be deemed expedient, or at any port or place to ship the whole or part of the goods by any other steamer, or to tranship or land and store and put into hulk or craft for such time as may be deemed expedient, and thence reship by lighter or otherwise the goods, and to forward them by any other conveyance to the port of destination, extra compensation to be paid for such service; and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by a vessel or vessels of the carrier for the time being, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond its control, by the perils of the sea, or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any

of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for damage of any kind resulting from fumigation or any other action of sanitary authorities in consequence of quarantine or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and that such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case of quarantine, the goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch; or should this be impracticable, or the ship not be admitted, the master may proceed on his voyage and land the goods at the nearest safe port (in his opinion) at the risk and expense of the owners of the goods, or retain them on board till ship returns. Quarantine expenses upon the goods, of whatever nature or kind, shall be borne by the owners of the goods, or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore.

5. Also, the master of the vessel has the option of hiring lighters at the port of destination for the landing of the within goods, at the expense and risk of the owners of said goods; and if this in his judgment is inexpedient, the goods to be taken from the ship's tackles, where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in warehouse, on the company's wharf, or sent to the public store, as the authorities at the port of discharge shall direct, and when deposited in the warehouse to be subject to storage and other charges as customary. If by reason of the want or impossibility of obtaining lighters, in the master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on

board, and to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignees, and the company shall not be responsible for damage or loss as the consequence thereof.

6. Also, that full freight is payable on damaged goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the invoice cost of goods when shipped, and the carrier has the option of replacing the goods at his expense. Notice of any claim arising under this bill of lading must be given by the consignee to the company's agent at the port of destination within 48 hours after the landing of or failure to deliver the goods.

9. Also, in case any part of the goods cannot be found
41 for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise.

10. Also, in case the surf or state of the weather upon the arrival of the steamer shall be such as to render it, in the master's opinion, impracticable to land the goods at the port to which they are destined, they may be retained on board until her return trip, or may be transferred to another steamer at the risk and expense of the owner or consignee of the goods.

11. Also, that the company may land said packages, or any of them, at any intermediate port. In such case it will either place them upon the wharf used by the company, or store them. If placed upon the wharf, all the conditions and agreements of this bill of lading shall be in force while they remain there. If stored, the liability of this company shall cease altogether during said storage. The place of storage does not belong to the company and is not managed by it. When this company shall have delivered said packages or any of them to any other carrier to be transported to their destination, its liability shall cease altogether. This agreement is made with reference and subject to the provisions of the United States Revised Statutes, sections 4281 to 4287, limiting the liability of ship-owners, and to the rules of the United States Supreme Court, made in pursuance thereof.

12. Also, in case of the blockade or interdict of the port of destination, or if without such interdict, the entering of the port of discharge should be considered unsafe, by reason of war or disturbances, the master to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in the warehouse, and a letter being put into the post-office addressed to the shipper and consignee, if named, stating the landing, and where deposited, the goods to be at the

shipper's and consignee's risk and expense, and the company to be discharged from all responsibility.

42 13. Also, any duty, tax, or impost, of whatever nature, levied upon the steamer by the authorities at the port of discharge, for or in connection with the goods herein described, to be paid by the consignees of the goods before delivery.

14. This agreement is made with reference to, and subject to, the provisions of the U. S. carriers' act, approved February 13th, 1893.

PIM, FORWOOD & CO., Ag'ts.

RESPONDENT'S EX. 2, Nov. 22, '94.

Atlas Steamship Company.

NEW YORK, 17 July, 1893.

Received from J. G. Polo on 19th inst. for S. S. *Ailsa* to 12 m. at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading, ab't 50 cases uniforms or bales.

(Signed)

R. G. Gemmell

(In margin :) All goods to have port of destination for which they are intended distinctly marked upon them, otherwise the company will not be responsible for the correct delivery of the goods.

RESPONDENT'S EX. 3, Nov. 22, 1894.

Atlas Steamship Co.

(Cut of flag.)

Pim, Forwood & Co., agents, 22 & 24 State street.

NEW YORK, July 19, 1893.

Received in good order, on pier 55 N. R., from Messrs. T. M. Turner for shipment by the steamship *Ailsa* to — at the ship-
43 per's risk from fire, and subject to the conditions expressed in the company's form of bill of lading. *All goods to have port of destination for which they are intended distinctly marked upon them, otherwise the company will not be responsible for the correct delivery of the goods.*

Ministerio de Guerra,

Barranquilla,

Bogota,

Twenty-six (26) bales clothing.

1/26

Three (3) coats caps.

27/29

John H. Stacey

Receiving Clerk.

(In margin:) The within-named goods while on quay or wharf, in steam-tender barges, or elsewhere, previous to shipment, to be at shipper's risk, and all risk of river craft, lighterage and fire to be borne by the shipper.

(Endorsed on back:) The attention of shippers is called to the following:

Petroleum, oil of vitriol, matches, gunpowder and all goods of an explosive, inflammable, or otherwise dangerous nature, will not be taken except under special agreement made with the agents, and written notice must be given to them before shipment thereof.

Act of Congress of 1851.

"Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment, a note in writing, expressing the nature and character of such merchandise to the master, mate or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

44 United States District Court, Southern District of New York.

CLIMACO CALDERON

vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED. }

In admiralty. Action for non-delivery of goods.

North, Ward & Wagstaff, for libellant.

Wheeler & Cortis, for respondent.

BROWN, J.:

On the 19th of July, 1893, the libellant delivered to the respondent, the owner of the steamships *Ailsa* and *Alvo*, in the city of New York, twenty-six bales and three crates of duck uniforms, to be transported to Baranquilla by way of Savanilla. The goods were taken to the wharf and delivered to the steamer *Ailsa* a few hours before she sailed. The steamers above named belong to the Atlas line, and were accustomed to touch at southern ports in the following order: Kingston, Savanilla, Carthagena, Port Limon and thence back direct to New York. The *Ailsa* arrived in due course at Savanilla, where she discharged other cargo; but the libellant's goods were overlooked, and the failure to discharge them was not discovered until she was well on her way towards Carthagena, the next port, 76 miles distant. Having to take on bananas—perishable cargo—at Port Limon, the last port, which were in waiting for her regular sailing days, and there being no other means of sending back the goods to Savanilla after the non-delivery was discovered, they were brought back to New York, where the *Ailsa* arrived on

the 16th of August, and immediately reshipped them on
 45 board the *Alvo*, which sailed on the same afternoon, and on
 her way out foundered at sea in a hurricane, in which ship
 and cargo were a total loss. The above libel was filed to recover
 the value of the 29 packages above named, amounting to about
 \$5,600.

In the body of the bill of lading was the provision that the steamer
 had liberty to call at any other port or ports in any order of rota-
 tion, etc., and that the owner and consignee agreed to be bound by
 "all the stipulations, exceptions and conditions as printed on the
 back thereof, whether written or printed, as fully as if they were all
 signed by the owner, consignee or holder." On the back were en-
 dorsed numerous exceptions, among others, that of perils of the
 seas, followed by nine numbered clauses, three of which only are
 material here: (1) That the "carrier should not be liable * * *
 for goods of any description which are above the value of \$100 per
 package, unless bills of lading are signed therefor, with the value
 therein expressed and a special agreement is made." (9) "Also in
 case any part of the goods cannot be found for delivery during the
 steamer's stay at the port of destination, they are to be forwarded
 by first opportunity when found, at the company's expense; the
 steamer not to be held liable for any claim for delay or otherwise."
 Last: "This agreement is made with reference to and subject to the
 provisions of the U. S. carriers' act, passed February 13, 1893.
 (Signed) Pim, Forwood & Co., agents."

The libellant had been accustomed to ship goods previously by
 the same line in numerous instances, upon bills of lading of the
 same character. Having delivered the goods to the *Ailsa* only a
 few hours before sailing, he did not receive the present bill of lading
 until after she sailed; but at the time of delivery he received a
 shipping receipt for the goods stating that they were subject to the
 conditions expressed in the company's form of bill of lading; and
 the bill of lading in the usual form as above expressed was after-
 wards delivered to him. Under such circumstances he must be

46 deemed to have had full knowledge of the conditions en-
 dorsed on the back of the bill of lading, and referred to in
 the body of it, and to have acquiesced in and agreed to those
 conditions, so far as they were lawfully inserted and were legally
 valid. *Potter v. The Majestic*, 60 Fed., 624. The provisions of the
 act of Congress of February 13, 1893, known as the Harter act,
 which is the last of the stipulations endorsed, supersedes all the other
 provisions that are inconsistent with it, either in the body of the
 bill of lading or endorsed upon it.

The provisions of the act last cited (2d Sup. Rev. St. Ch. 105, p. 81)
 provide that it "shall not be lawful to insert in any bill of lading
 any agreement whereby the owner shall be relieved from liability
 for loss or damage arising from negligence, fault or failure in the
 proper loading, stowage, custody, care or proper delivery of any and
 all lawful merchandise or property committed to its or their charge;
 any and all words or clauses of such import inserted in bills of lad-
 ing or shipping receipts shall be null and void and of no effect."

If, therefore, the respondents are chargeable with negligence or failure in the proper loading, stowage or proper delivery of these goods, they are liable for the damages arising therefrom, anything else in the bill of lading, or in the provisions endorsed thereon, to the contrary.

It is plain that, independently of the ninth clause endorsed on the bill of lading as above quoted, there was "a failure in the proper delivery" of these goods. "Proper delivery" includes a timely delivery. It does not permit goods to be carried voluntarily away from the port of destination upon another voyage. The defence must, therefore, rest on the stipulation of the bill of lading. But the Harter act prohibits the *insertion* of any stipulation excusing a "failure in proper delivery." The words "proper delivery" as used in the act cannot mean any kind of a delivery that may be stipulated for, however unreasonable the stipulation may be; since that would thwart the very purpose of the first section of the statute, which was designed to protect shippers against the imposition
47 of unreasonable stipulations in bills of lading to the prejudice of their interests. It is, perhaps, competent for the parties to make special provisions as to the mode of delivery, having reference to the usual ways of business, and the conveniences or necessities of vessels in touching at various ports; and in so far as these stipulations are shown by the circumstances to be reasonable, they may be upheld as defining what a "proper delivery" shall be, and may thus justify what might not otherwise be held to be a proper delivery. Farther than this such stipulations cannot go without subverting the purpose of the act.

It is contended for the respondent that the ninth clause is a reasonable one, inasmuch as the necessities of proper stowage and distribution of a mixed cargo for the safety of the ship, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call, because they cannot be found at the time when they ought to be discharged; and that the ship, being under the necessity of making trips at regular dates, without delays that would be injurious to perishable cargo waiting for it, should not always be bound to wait for a general overhauling of cargo not destined for a port of call, but should have the privilege in such cases of forwarding the goods afterwards when found at its own expense.

Conceding the reasonableness and validity of the stipulation in the present case, it manifestly must be applied with strictness as against the carrier. It cannot be sustained as a defence where the failure to find and deliver the goods has resulted from any negligence in the stowage or care of the goods with reference to the convenient finding and delivery of them at the port of call; or where there has been any remissness in such search for the goods as is practicable at the time; and the burden of showing diligence in these respects is upon the carrier.

48 The respondent's evidence in the present case wholly fails to meet these requirements. If, as one witness states, the

goods were placed at the *bottom* of No. 3 hold, with goods for Carthagena stowed above them, that was negligence in stowage of Savanilla cargo, unless it was designed to discharge all the goods in No. 3 hold at that port. There is, moreover, no evidence of any endeavor whatsoever to *find* the goods at Savanilla. The limitation of the ninth clause, viz: "if the goods cannot be found" is certainly not a meaningless provision. It is of the very essence of any reasonableness in that stipulation, that all reasonable efforts shall be made to find the goods, as well as to avoid burying them at the port of shipment in places where they cannot or are not likely to be found. Here there is no evidence of care in either respect. The failure to deliver the goods does not seem to have been even noticed until the vessel had left Savanilla and was well on her way to Carthagena. The inference, therefore, is that the cause of the overcarriage was mere inattention in stowing or in discharging. I must find, therefore, that there was a "failure in the proper delivery" of the goods at Savanilla, not excused by anything in the testimony or in the bill of lading.

As the respondent fails to justify its carriage of the goods beyond their destination, the case as respects these goods becomes one of deviation. The vessel, it is true, did not herself depart from her course or delay her contemplated voyage; but she continued the carriage of these particular goods upon the high seas long beyond what the contract allowed, exposing them to three times the sea perils contemplated, and in the end shipped them upon another vessel from the original port of departure, whereby they were lost through sea perils.

It is urged that the final loss of the goods was by a hurricane, an extraordinary sea peril, which was an accidental result, and not a proximate or natural result, of the overcarriage. The cases of *R. R. Co. v. Reeves*, 10 Wall., 176; the *R. D. Bibber*, 8 U. S. App.,

49 42; 2 C. C. A., 50; 50 Fed., 841; *Denny vs. N. Y. C. R. R. Co.*, 13 Gray, 481; *Hoadley vs. Northern Trans. Co.*, 115 Mass., 304; *Mich. Cent. R. R. Co. v. Burrows*, 33 Mich., 6, are cited in support of this contention. None of these cases, however, are cases of voluntary or negligent deviation in the carriage of goods by sea. In marine transportation it is well settled that any unauthorized overcarriage of goods, or a shipment of them by another vessel than that contracted for, renders the carrier liable as insurer, both for violation of the contract and because the shipper's insurance is thereby avoided, and he has no opportunity to protect himself by the ordinary security of marine insurance. These reasons apply more emphatically in this case than in ordinary cases of deviation. For these goods were brought back to the very point of starting; no notice was given to the shipper; he was ignorant of the facts, and the opportunity was not given him to insure that might have been given. The cases above cited have never been applied, so far as I know, to cases of maritime deviation. I must, therefore, hold the respondent liable as insurer. 1 Pars. Ship. & Adm., 171, note, and many cases there cited; *Ellis v. Turner*, 8 T.

R., 531; *Trott v. Wood*, 1 Gall., 443; *Bazine v. SS. Co.*, 3 Wall., Jr., 229; 2 Fed. Cas., 1097; *The Bordentown*, 40 Fed., 682, 689.

It is further contended that under the first clause of the bill of lading the libellant's recovery cannot exceed \$100 per package, as the value was not made known, nor any agreement made for the payment of freight at an extra rate. The validity of stipulations of this character has been repeatedly upheld by the Supreme Court. *N. Y. Cent. v. Fraloff*, 100 U. S., 24, 27; *Hart v. Pa. R. R. Co.*, 112 U. S., 331; *Magnin v. Dinsmore*, 70 N. Y., 410; *Baldwin v. Liverpool*, 74 N. Y., 125; and recently in the court of appeals of this circuit in *Potter v. The Majestic*, 60 Fed., 624, 630.

It is urged that effect ought not to be given to this stipulation, because literally read it provides that the carrier shall not be liable for *anything* in this case; and that this is so unreasonable that the stipulation should be allowed no effect at all. I do not think that construction was the intention of the stipulation, or that it is a reasonable construction of it. Literally, the goods which are above \$100 in the package may be excluded from consideration, and only those which amount to \$100 be regarded. This, I think, is the fair intention of the clause in question; and as the decisions cited sustain it as thus construed, I must hold accordingly, and allow a decree for the libellant for \$2,900 for the twenty-nine packages, with interest and costs.

Dated New York, December 3, 1894.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-rooms in the city of New York on Monday, the 31st day of December, 1894.

Present: Hon. Addison Brown, district judge.

CLIMACO CALDERON

vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED. }

This cause having come on to be heard upon the pleadings and proofs of the respective parties, now after hearing argument of counsel, due deliberation having been thereupon had, and the court being fully advised in the premises, and on motion of North, Ward & Wagstaff, Esqs., proctors for the libellant, it is

Ordered, adjudged, and decreed that Climaco Calderon, the libellant, do recover of The Atlas Steamship Company, Limited, the respondent, the sum of twenty-nine hundred dollars as and for his damages by him sustained in respect of the matters in the libel herein set forth, together with interest thereon from the nineteenth day of July, A. D. 1893, to the date of this decree, amounting to the sum of two hundred and fifty-two dollars and twenty-six cents, and his costs and disbursements of this cause to be taxed, and as taxed, amounting to the sum of forty-two dollars and eighty-five cents, in all the sum of three thousand one hundred and ninety-five dollars and eleven cents, and that he have execution therefor.

ADDISON BROWN.

(Endorsed:) Final decree. Filed Dec. 31, 1894.

District Court of the United States for the Southern District of New York.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED. } In Admiralty.

GENTLEMEN: You will please to take notice that the libellant above named hereby appeals to the United States circuit court of appeals for the second circuit from the decree of this court, made and entered herein, and dated the 31st day of December, A. D. 1894.

Dated New York, January 2d, 1895.

Yours, &c., NORTH, WARD & WAGSTAFF,
Libellant's Proctors.

Wheeler & Cortis, Esqs., respondent's proctors.
Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed Jan'y 7, 1895.

52 District Court of the United States for the Southern District of New York. In Admiralty.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED. }

Libellant's Assignment of Error.

The libellant, appellant, assigns for error in the decree of this court in the above-entitled cause:

First. That this court held that this libellant was bound by "the stipulations, exceptions and conditions" printed upon the back of the bill of lading set out in the libel herein.

Second. That this court held that of said stipulations, exceptions and conditions the clause numbered (1), and in part in the words and figures following, to wit: "The carrier shall not be liable for gold, silver, bullion * * * or for goods of any description which are about the value of \$100 per package unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made" was a reasonable condition, binding upon this libellant, and to be construed as a limitation of the liability of the respondent to the sum of one hundred dollars per package for the libellant's goods.

Third. That this court held that this libellant was limited in his recovery to the sum of one hundred dollars for each package of merchandise lost.

53 Fourth. That this court decreed that this libellant recover of the respondent the sum of twenty-nine hundred dollars as and for his damages by him sustained in respect of the

matters in the libel herein set forth instead of the actual amount of said damages to be determined by a commissioner of this court, and amounting to fifty-four hundred and thirteen dollars and eighteen cents, without interest.

Fifth. That the decree herein is for twenty-nine hundred dollars damages instead of fifty-four hundred and thirteen dollars and eighteen cents damages.

NORTH, WARD & WAGSTAFF,
Libellant's Proctors.

(Endorsed:) Assignment of errors. Filed January 7, 1895.

54 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

CLIMACO CALDERON, Libellant and Appellant,
vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED, Respondent and }
Appellee. }

I, Samuel H. Lyman, clerk of the district court of the United States of America, for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause, made up pursuant to rule No. 4, in admiralty, of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

SAMUEL H. LYMAN, *Clerk.*

55 United States Circuit Court of Appeals, Second Circuit.

CLIMACO CALDERON, Libellant, Appellant,
vs.

THE ATLAS STEAMSHIP COMPANY, Respondent, Appellee. }

This is an appeal from a decree of the district court, southern district of New York, in favor of the libellant for \$2,900 with interest and costs, the appellant contending that the decree erroneously limited his recovery.

LACOMBE, *Circuit Judge:*

Libellant shipped twenty-six bales and three crates of duck uniforms for transportation by the steamship "Ailsa" from New York to Savanilla, thence by rail to Barranquilla, there to be delivered to the collector of customs, for which respondent issued its bill of lading. The goods were not landed at Savanilla, but were brought

back to New York and reshipped on the "Alvo" of the same line, which was lost at sea on the voyage with all on board. The actual value of the goods lost was \$5,413.18.

Inasmuch as the respondent has not appealed, the only question before this court is whether the district court erred in limiting the amount of libellant's recovery to \$100 per package under the bill of lading.

The bill contained on its face the following provision :

56 "And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were signed by such shipper, owner, consignee or holder."

On the back of the bill of lading, among numerous other clauses, was printed the following :

" 1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed and a special agreement is made."

Stipulations in bills of lading, limiting the amount of the carrier's liability on each package carried to some stated sum, unless the value of the package is declared, and a special agreement made, have been repeatedly held valid, and such reasonable regulations for the conduct of the carrier's business so as to prevent imposition upon him, and to establish proper charges adequate to the extent of the risks to be undertaken, may be communicated to the shipper by notice printed upon the carrier's receipt (*Hart vs. Pennsylvania R. R.*, 112 U. S., 331; *Railroad Co. vs. Fraloff*, 100 U. S., 24; *Potter vs. The Majestic*, 60 Fed. Rep., 624). It is contended that the clause above quoted is not such as these authorities sanction, namely, a reasonable regulation to protect the carrier from excessive loss, where the hazardous character of the goods, or the fact that they are valuable, is not disclosed to him, but is rather a clause undertaking to relieve the carrier entirely from his common-law liability, and therefore not enforceable. The language used, " Shall not be liable for gold, * * * or for goods of any description which are above the value of \$100 per package, unless," &c., if literally construed, would no doubt import that the carrier shall be liable for nothing in the package if its value is over \$100. But a more reasonable interpretation is that adopted by the district judge, 57 namely, that the goods which are above the \$100 in the packages may be excluded from consideration, and only those which amount to \$100 be regarded. Being a clause in a written form of contract prepared by the carrier, and susceptible of two constructions, it is to be construed in favor of the other party, and, as thus construed, it applies only to such of the goods in each package as are in excess of the stipulated value, and is therefore within the authorities above cited.

The decree of the district court is affirmed, with costs of this court to the appellee.

(Endorsed :) U. S. circuit court of appeals, second circuit. Climaco Calderon *vs.* The Atlas Steamship Company. Opinion, Lacombe, J. United States circuit court of appeals, second circuit. Filed Jul- 30, 1895. James C. Reed, clerk.

U. S. Circuit Court of Appeals, Second Circuit.

CALDERON, Appellant,

vs.

THE ATLAS STEAMSHIP CO., LIM., Appellee. }

WALLACE, *Circuit Judge* :

I dissent from the judgment of the court in this case. The twenty-six bales of goods in controversy were shipped by the libellant at New York for transportation to and delivery at Savanilla. The goods were not delivered by the steamship, but were forgotten and overlooked by those in charge of her while she was being unloaded at Savanilla. After she had left the port the goods were discovered, and were taken back by the steamship to New York and thence reshipped to their original destination on board another vessel, which foundered at sea, and the goods were lost. The corporation owning the steamship attempts to escape liability for the loss of the goods by a defense founded upon a condition in the bill of lading, which reads as follows : " In case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise." The bill of lading contained also another condition, which reads as follows :

" This agreement is made with reference to, and subject to, the provisions of the U. S. carrier's act, passed February 13, 1893." By that act, commonly known as the Harter act (27 U. S. Statutes at Large, 445), it is provided, among other things, that it shall not be lawful for the owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause or agreement whereby the vessel shall be relieved " from liability for loss of damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery " of any merchandise committed to its charge, and that any words of such import inserted in the bill of lading " shall be null and void and of no effect." The court below correctly decided that the condition relied upon was in direct contravention of the statute which the parties by express agreement had incorporated into the bill of lading, and, therefore, ineffectual to absolve the steamship company from liability for the failure, through negligence, to make proper delivery of the goods. But the court also decided that the steamship company was entitled to a partial exemption from liability because of another condition in the bill of lading which reads as follows : " It is also

mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." In the opinion it was conceded that the condition, if read literally so as to exempt the carrier wholly for goods in packages exceeding in value \$100, would be too unreasonable to be sustained; but the court concluded that it should be construed as intended to exclude liability beyond \$100 for goods in any one package, and as so construed was a reasonable one, and therefore valid.

This court in the prevailing opinion has adopted the conclusions of the court below. The construction thus given to the condition seems to me ignores its explicit terms, expressed in the plainest possible language. I think the condition was intended to exempt the carrier wholly in case of loss or damage to any goods of the several kinds mentioned in it, including those the value of which would exceed \$100 per package. To uphold such a condition would permit a carrier, receiving goods which he may know are worth more than \$100 per package, to absolve himself from all responsibility in respect to them; and thus divest himself altogether of the obligations which are inseparable from his occupation.

But if the condition is capable of being read so as to exempt the carrier from liability beyond the amount of \$100 for each package, it does not include a liability for a negligent loss of the goods. In construing in a bill of lading the exceptions to the carrier's liability the rule obtains both in the English courts and our own that where the words leave the intention in doubt they are to be construed against him, and their meaning is not to be extended to give him a

protection for which he has not bargained in clear terms; 60 and it is therefore to be presumed, unless the contrary is stated,

that he is to continue liable for negligent acts and faults committed by himself or his servants. General words exempting him from liability under particular circumstances do not protect him from the consequences of his own negligence. If it had been the purpose of the condition, explicitly expressed, to lessen the liability of the steamship company from the consequences of a loss arising from its own negligence or that of its agents, the condition would have been prohibited, and therefore void, by the act of Congress. In order to give it any effect it must be read as though it were not intended to apply to such a loss. The condition is not one whereby the shipper and carrier agree in advance, by the terms of the contract, upon the value of the goods, and limit the liability of the carrier to a sum not to exceed the valuation; and the cases of *Hart vs. Pennsylvania R. R.* (112 U.S., 331); *Muser vs. Holland* (17 Blatch., 412); *Groves vs. R. R. Co.* (137 Mass., 33), and several others which might be cited where the contract was of that description, are not in point.

In *Hart vs. Pennsylvania R. R.*, the court say:

"The agreement as to value, in this case, stands as if the carrier

had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." And in concluding the opinion the court used the following language: "The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

61 There is no injustice in restricting a shipper's claim to damages to the value he places on his property for transportation. Where the contract and the rate of freight are based upon an assumed fictitious value of the goods carried the parties are bound to that value in case of loss (*McCance vs. L. & N. W. R. Co.*, 34 L. J., Ex. 39). Where there is an agreed valuation stated in the contract, that is assumed as the basis of the carrier's compensation and responsibility. Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability, the liability of the carrier as an insurer as well as for a negligent loss. In the present case there was no statement of the value of the goods. The bill of lading was delivered after the steamship company had received the goods, and as delivered it was silent in respect to their value. Construing it as intended to exempt the steamship company from liability beyond the value of \$100 per package, the contract between the parties was merely that this sum should be deemed the limit of the company's liability. Such a contract is not the equivalent of one valuing the goods, and the exemption therefrom does not reach a loss by the carrier's negligence. This was distinctly adjudged in *Maguin vs. Dinsmore* (56 N. Y., 168) and *Westcott vs. Fargo* (61 N. Y., 542), and in both of these cases it was held that a condition to exempt the carrier from liability for loss beyond a specified sum, in the absence of a statement of value by the shipper, would not exempt him from liability for loss by his own negligence. On the contrary; in *Belger vs. Dinsmore* (51 N. Y., 156), where the condition provided that the goods should be valued at a specified sum, in the absence of a statement in the contract of a different value, the same court held the carrier's liability to be limited to that sum in the absence of the statement, although the loss was by his own negligence.

62 The authorities are elaborately considered and reviewed in *Louisville R. R. Co. vs. Wynn* (88 Tenn., 320), and the conclusion reached that a condition limiting the liability of a carrier in case of loss to a specified sum, in the absence of a statement of a different value, is not a valuation of the goods, and does not relieve the carrier from liability for the whole value in case of a negligent loss.

The steamship company could have exacted from the libellant a statement of the value of his goods if it had seen fit to do so, or it could have required him to agree that they should be regarded as of a certain value in the absence of a statement upon his part of a different value, but it did neither, and only stipulated with him that it should not be liable beyond a specified sum in case of loss. The law presumes that this agreement does not refer to a loss by the carrier's negligence.

For these reasons I think there should be a reversal of the decree below, and a decree for the libellant for the whole value of his goods.

(Endorsed :) U. S. cir. ct. of appeals, second cir. Calderon, appellant, vs. The Atlas Steamship Co. (Lim.), appellee. Wallace, C. J. United States circuit court of appeals, second circuit. Filed Jul- 30, 1895. James C. Reed, clerk.

63 UNITED STATES OF AMERICA, }
Southern District of New York, } 88 :

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to 62, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Climaco Calderon, libellant and appellant, against The Atlas Steamship Company (Limited), respondent and appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-sixth [L. s.] day of November, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and twentieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

64 UNITED STATES OF AMERICA, 88 :

The President of the United States of
Seal of the Supreme Court of the United States. America to the honorable the judges of
the United States circuit court of appeals for the second circuit, Greeting :

Being informed that there is now pending before you a suit in which Climaco Calderon is appellant and The Atlas Steamship Company, Limited, is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said

65 circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

66 [Endorsed:] Supreme Court of the United States. No. 806, October term, 1895. Climaco Calderon *vs.* The Atlas Steamship Company, Limited. Writ of certiorari.

67 United States Circuit Court of Appeals for the Second Circuit.

| | |
|--|---|
| CLIMACO CALDERON, Libellant, Appellant, | } |
| <i>vs.</i> | |
| THE ATLAS STEAMSHIP COMPANY (LIMITED), Respondent, Appellee. | |

It is hereby stipulated between the parties that the certified copy of the record in this cause, which was certified by the clerk of this court and filed in the Supreme Court of the United States, with a petition for a writ of certiorari presented by the appellant herein, may be taken to be the return to the writ of certiorari issued by the Supreme Court of the United States with like effect as if the same had been certified to the said Supreme Court by the said clerk of the circuit court of appeals under said writ.

J. LANGDON WARD,
Counsel for Appellant.
EVERETT P. WHEELER,
Advocate for Appellee.

A copy.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

68 [Endorsed:] United States circuit court of appeals for the second circuit. Climaco Calderon, libellant, appellant, *vs.* The Atlas Steamship Company (Limited), respondent, appellee. Stipulation as to return to certiorari. J. Langdon Ward, proctor for appellant.

69 To the honorable the Supreme Court of the United States :

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed,

and, under the direction of counsel for the appellant, said stipulation is certified as a return to this writ.

New York, December 27, 1895.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED,
*Clerk of the United States Circuit Court of
Appeals for the Second Circuit.*

70 [Endorsed:] Case No. 16,096. Supreme Court U. S., October term, 1896. Term No., 378. Climaco Calderon, appellant, vs. The Atlas Steamship Co. (Limited). Writ of certiorari and return. Filed Dec. 30, 1895.

Endorsed on cover: Case No. 16,096. U. S. circuit court of appeals, second circuit. Term No., 378. Climaco Calderon, appellant, vs. The Atlas Steamship Company, Limited. Filed November 30, 1895.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

CLIMACO CALDERON, PETITIONER.

Petition for writ of certiorari requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court, for its review and determination, the case of Climaco Calderon, appellant, vs. The Atlas Steamship Company, Limited, respondent.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES :

The petition of Climaco Calderon respectfully shows to this Honorable Court as follows :

FIRST. That your petitioner is, and since the year 1885 has been, the Consul-General of the United States of Colombia in the City of New York. That on or about the 19th day of July, in the year one thousand eight hundred and ninety-three, he delivered to The Atlas Steamship Company, Limited, twenty-six bales and three crates of duck uniforms consigned to the Minister of War at Bogota in the United States of Colombia, to be transported by the British steamship "Ailsa," then lying in the Port of New York, to Savanilla, and there to be delivered to the Barranquilla Railway and Pier Company or their agents, for conveyance to Barranquilla, there to be delivered to the Collector of Customs, for the consideration of \$39.43, which your petitioner then and there paid.

SECOND. That at the time of the delivery of the said goods to the Atlas Steamship Company, Limited, there was issued to the cartman a receipt reciting that the said goods were received on the pier for shipment by the steamship "Ailsa" to _____, at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading, which receipt was thereafter delivered to your petitioner, and thereafter surrendered to the Atlas Steamship Company, Limited, and bills of lading issued to him therefor, all of like tenor and date, reciting that said goods had been received in apparent good order and condition from your petitioner to be transported by the said steamship to Savanilla, there to be delivered to the Barranquilla Railway and Pier Company, or their agents, for conveyance to Barranquilla.

In the said bills of lading there occurred the following clauses :

"In accepting this bill of lading the shipper agrees that all questions arising under the same shall be construed according to the laws of Great Britain, as administered in Great Britain."

"And finally, in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all of these stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder."

THIRD. That on the back of said bills of lading, there was printed a long endorsement containing, among other things, the following :

"1. It is also mutually agreed that the carrier shall not be liable for Gold, Silver, Bullion, Specie, Documents, Jewelry, Pictures, Embroideries, Works of Art, Furs, Silks, China, Porcelain, Watches, Clocks, or for Goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed and a special agreement is made.

"9. Also in case any part of the goods cannot be found for delivery during the steamship's stay at the port of destination, they are to be forwarded by first opportunity when found at the Company's expense, the steamer not to be held liable for any claim for delay or otherwise.

"14. This agreement is made with reference to and subject to the provisions of the United States Carriers Act, approved February 15, 1893."

FOURTH. That the steamship "Ailsa" having the said goods on

board, proceeded on her voyage from New York and arrived safely at Savanilla, but the goods so shipped by your petitioner were not there discharged as they should have been, but were carried on to Cartagena, and from thence back to New York and there reshipped on the steamship "Alvo," then bound for Savanilla, which vessel having said goods on board sailed on her intended voyage, but never arrived at her port of destination, having been lost at sea with all on board.

FIFTH. That your petitioner was not advised of the non-delivery of the said goods at Savanilla, or of their reshipment on the steamship "Alvo" until after the same had been lost.

SIXTH. That thereafter, and on or about the 2d day of March, 1894, your petitioner exhibited his libel in the District Court of the United States for the Southern District of New York in the Second Circuit, claiming to recover from the said Atlas Steamship Company, Limited, the sum of \$5,600 for the value of the merchandise so shipped by him and lost as aforesaid.

SEVENTH. That thereafter such proceedings were had in the said District Court under the said libel, that the said respondent The Atlas Steamship Company, Limited, was held to be liable for the loss of the said merchandise, because caused by its negligence, but it was held by the said Court that such liability was limited to the sum of \$100 for each package of goods shipped by your petitioner by reason of the clause printed upon the back of said bill of lading, purporting to set forth a mutual agreement that the carrier should not be liable for goods of any description which were above the value of \$100 per package, unless bills of lading were signed therefor, with the value therein expressed and a special agreement made. And thereupon and thereafter a decree was entered in said District Court in favor of your petitioner and against the said Atlas Steamship Company, Limited, for the sum of \$2,900, as and for your petitioner's damage by him sustained in respect of the matters in the said libel set forth, with interest and costs.

EIGHTH. That the decision of the said District Court proceeded upon the ground that, notwithstanding there was no pretense that your petitioner had assented to the provisions and conditions printed on the back of said bill of lading in any way other than by

receiving the same, or that his attention had been called thereto, or that he had knowledge thereof, except that, on eight or ten occasions within three or four years, your petitioner had made shipments of goods on the respondent's steamers for which it was claimed that similar bills of lading had been issued; and, notwithstanding the decision of this Honorable Court in the case of "Railroad Company vs. Manufacturing Company," 16 Wallace, 318, your petitioner was bound by the clauses printed on the back of the said bills of lading above recited; and that, notwithstanding your petitioner had no part in framing said condition, which was wholly devised by the carrier, and notwithstanding the literal, natural and ordinary import of its wording was to exempt the carrier from any liability whatsoever in respect of the several classes and descriptions of goods therein mentioned even though lost or damaged through its own fault or negligence which rendered the whole condition void under the decisions of this Court and the provisions of the act, approved February, 13, 1893, entitled "An Act relating to navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property"; and notwithstanding no other construction than that of absolute exemption of the carrier from any liability whatever in respect of loss, damage or injury to goods, however caused, in fifteen out of the sixteen classes of goods specified was possible; and notwithstanding there was nothing to indicate a change of intent in the case of the sixteenth class, nevertheless the words, "Nor for goods of any description which are above the value of \$100 per package," were in this case to be read as if written, "Nor to an amount exceeding \$100 per package for goods of any description."

NINTH. That from the decree of the said District Court your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, and thereafter such proceedings were had upon such appeal that on the 30th day of July last past said Court rendered its decision affirming the decree of the said District Court, two of the Judges of said Court concurring in an opinion in favor of affirming the said decree of the said District Court and the remaining Judge filing a dissenting opinion in favor of reversing said decree and directing a decree in favor of your petitioner for the full value of the goods so shipped by him, as aforesaid, which said opinions are as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY,
Respondent-Appellee.

This is an appeal from a decree of the District Court, Southern District of New York, in favor of the libellant for \$2,900 with interest and costs, the appellant contending that the decree erroneously limited his recovery.

LACOMBE, Circuit Judge :

Libellant shipped twenty-six bales and three crates of duck uniforms for transportation by the steamship "Ailsa" from New York to Savanilla, thence by rail to Barranquilla, there to be delivered to the Collector of Customs, for which respondent issued its bill of lading. The goods were not landed at Savanilla, but were brought back to New York and reshipped on the "Alvo" of the same line, which was lost at sea on the voyage with all on board. The actual value of the goods lost was \$5,413.18.

Inasmuch as the respondent has not appealed, the only question before this Court is whether the District Court erred in limiting the amount of libellant's recovery to \$100 per package under the bill of lading.

The bill contained on its face the following provision :

"And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder."

On the back of the bill of lading, among numerous other clauses, was printed the following :

"1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed and a special agreement is made."

Stipulations in bills of lading, limiting the amount of the carrier's liability on each package carried to some stated sum, unless the value of the package is declared and a special agreement made have been repeatedly held valid, and such reasonable regulations for the conduct of the carrier's business so as to prevent imposition upon him and to establish proper charges adequate to the extent of the risks to be undertaken may be communicated to the shipper by notice printed upon the carrier's receipt (*Hart vs. Pennsylvania R. R.*, 112 U. S., 331; *Railroad Co. vs. Fraloff*, 100 U. S., 24; *Potter vs. The Majestic*, 60 Fed. Rep., 624). It is contended that the clause above quoted is not such as these authorities sanction, namely, a reasonable regulation to protect the carrier from excessive loss, where the hazardous character of the goods or the fact that they are valuable is not disclosed to him, but is rather a clause undertaking to relieve the carrier entirely from his common law liability and therefore not enforceable. The language used, "shall not be liable for gold * * * or for goods of any description which are above the value of \$100 per package, unless," &c., if literally construed would, no doubt, import that the carrier shall be liable for nothing in the package if its value is over \$100. But a more reasonable interpretation is that adopted by the District Judge, namely, that the goods which are above the \$100 in the package may be excluded from consideration and only those which amount to \$100 be regarded. Being a clause in a written form of contract prepared by the carrier, and susceptible of two constructions, it is to be construed in favor of the other party, and as thus construed it applies only to such of the goods in each package as are in excess of the stipulated value, and is therefore within the authorities above cited.

The decree of the District Court is affirmed with costs of this Court to the appellee.

U. S. COURT OF APPEALS,

SECOND CIRCUIT.

CALDERON,

Appellant,

vs.

THE ATLAS STEAMSHIP CO., LIM.,

Appellee.

WALLACE, Circuit Judge :

I dissent from the judgment of the Court in this case. The twenty-six bales of goods in controversy were shipped by the libellant at New York for transportation to and delivery at Savanilla. The goods were not delivered by the steamship but were forgotten and overlooked by those in charge of her while she was being unloaded at Savanilla. After she had left the port the goods were discovered and were taken back by the steamship to New York and thence reshipped to their original destination on board another vessel, which foundered at sea and the goods were lost. The corporation owning the steamship attempts to escape liability for the loss of the goods by a defense founded upon a condition in the bill of lading which reads as follows :

" In case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

The bill of lading contained also another condition, which reads as follows :

" This agreement is made with reference to and subject to the provisions of the U. S. Carriers' Act, passed February 13, 1893."

By that act, commonly known as the Harter Act (27 U. S. Statutes at Large, 445), it is provided among other things that it shall not be lawful for the owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause or agreement whereby the vessel shall be re-

lieved "from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of any merchandise committed to its charge, and that any words of such import inserted in the bill of lading "shall be null and void and of no effect." The Court below correctly decided that the condition relied upon was in direct contravention of the statute which the parties by express agreement had incorporated into the bill of lading, and therefore ineffectual to absolve the steamship company from liability for the failure, through negligence, to make proper delivery of the goods. But the Court also decided that the steamship company was entitled to a partial exemption from liability because of another condition in the bill of lading, which reads as follows:

"It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

In the opinion it was conceded that the condition, if read literally so as to exempt the carrier wholly for goods in packages exceeding in value \$100, would be too unreasonable to be sustained; but the Court concluded that it should be construed as intended to exclude liability beyond \$100 for goods in any one package, and, as so construed, was a reasonable one, and therefore valid.

This Court, in the prevailing opinion, has adopted the conclusions of the Court below. The construction thus given to the condition, seems to me, ignores its explicit terms, expressed in the plainest possible language. I think the condition was intended to exempt the carrier wholly in case of loss or damage to any goods of the several kinds mentioned in it, including those the value of which would exceed \$100 per package. To uphold such a condition would permit a carrier, receiving goods which he may know are worth more than \$100 per package, to absolve himself from all responsibility in respect to them, and thus divest himself altogether of the obligations which are inseparable from his occupation.

But if the condition is capable of being read so as to exempt the carrier from liability beyond the amount of \$100 for each package, it does not include a liability for a negligent loss of the goods. In construing in a bill of lading the exceptions to the carrier's liability the rule obtains both in the English courts and our own that where the

words leave the intention in doubt they are to be construed against him, and their meaning is not to be extended to give him a protection for which he has not bargained in clear terms; and it is therefore to be presumed, unless the contrary is stated, that he is to continue liable for negligent acts and faults committed by himself or his servants. General words exempting him from liability under particular circumstances do not protect him from the consequences of his own negligence. If it had been the purpose of the condition, explicitly expressed, to lessen the liability of the steamship company from the consequences of a loss arising from its own negligence or that of its agents, the condition would have been prohibited, and therefore void, by the Act of Congress. In order to give it any effect it must be read as though it were not intended to apply to such a loss. The condition is not one whereby the shipper and carrier agree in advance, by the terms of the contract, upon the value of the goods, and limit the liability of the carrier to a sum not to exceed the valuation; and the cases of *Hart vs. Pennsylvania R. R.* (112 U. S., 331); *Muser vs. Holland* (17 Blatch., 412); *Grooves vs. R. R. Co.* (137 Mass., 33) and several others which might be cited where the contract was of that description, are not in point.

In *Hart vs. Pennsylvania R. R.*, the Court say: "The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." And in concluding the opinion the Court used the following language: "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

There is no injustice in restricting a shipper's claim for damages to the value he places on his property for transportation. Where the contract and the rate of freight are based upon an assumed fictitious value of the goods carried the parties are bound to that value in case of loss [*McCance vs. L. & N. W. R. Co.* (34 L. J., Ex. 39)]. Where there is an agreed valuation stated in the contract,

that is assumed as the basis of the carrier's compensation and responsibility. Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability, the liability of the carrier as an insurer as well as for a negligent loss. In the present case there was no statement of the value of the goods. The bill of lading was delivered after the steamship company had received the goods, and as delivered it was silent in respect to their value. Construing it as intended to exempt the steamship company from liability beyond the value of \$100 per package, the contract between the parties was merely that this sum should be deemed the limit of the company's liability. Such a contract is not the equivalent of one valuing the goods, and the exemption therefore does not reach a loss by the carrier's negligence. This was distinctly adjudged in *Magnin vs. Dinsmore* (56 N. Y., 168) and *Westcott vs. Fargo* (61 N. Y., 542), and in both of these cases it was held that a condition to exempt the carrier from liability for loss beyond a specified sum, in the absence of a statement of value by the shipper, would not exempt him from liability for loss by his own negligence. On the contrary, in *Belger vs. Dinsmore* (51 N. Y., 156), where the condition provided that the goods should be valued at a specified sum, in the absence of a statement in the contract of a different value, the same Court held the carrier's liability to be limited to that sum in the absence of the statement, although the loss was by his own negligence.

The authorities are elaborately considered and reviewed in *Louisville R. R. Co. vs. Wynn* (88 Tenn., 320), and the conclusion reached that a condition limiting the liability of a carrier, in case of loss, to a specified sum, in the absence of a statement of a different value, is not a valuation of the goods, and does not relieve the carrier from liability for the whole value in case of a negligent loss.

The steamship company could have exacted from the libellant a statement of the value of his goods, if it had seen fit to do so, or it could have required him to agree that they should be regarded as of a certain value in the absence of a statement upon his part of a different value; but it did neither, and only stipulated with him that it should not be liable beyond a specified sum in case of loss. The law presumes that this agreement does not refer to a loss by the carrier's negligence.

For these reasons I think there should be a reversal of the

decree below, and a decree for the libellant for the whole value of his goods.

TENTH. A certified copy of the entire record of the said cause in the said Circuit Court of Appeals is herewith furnished, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals.

ELEVENTH. That it is of serious importance to all persons shipping goods for transportation on the high seas, especially where, as in the case of shipments to the United States of Colombia and other places in South America, shippers are practically restricted to a single transportation line, that it should be definitively settled whether they are bound by any stipulations and conditions inserted by the carrier in, or printed upon the backs of, bills of lading merely by their receipt thereof when their attention is not called nor their assent asked to the same; and whether by such a stipulation or condition in the absence of express assent or agreement thereto by the shipper a carrier may lawfully limit the extent of his liability in case of loss or damage, the result of his own negligence or wrongdoing, or that of his officers and agents.

TWELFTH. That no mandate has issued from the said Circuit Court of Appeals to the said District Court in said cause, and no order therefor has been entered.

THIRTEENTH. Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination, and in conformity with the provisions of Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said cause being made final in the said Circuit Court of Appeals by the said act.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to

this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Climaco Calderon, Libellant-Appellant, vs. The Atlas Steamship Company (Limited), Respondent-Appellee," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said decision of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

CLIMACO CALDERON.

J. LANGDON WARD,
Of Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, ss.:

CLIMACO CALDERON, being duly sworn, says: I am the petitioner above named; I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my knowledge, information and belief.

CLIMACO CALDERON.

Sworn to and subscribed be-
fore me this nineteenth day }
of November, 1895.

HENRY P. BUTLER,

[L. S.] U. S. Commissioner for the Southern Dist. of N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

TO MESSRS. WHEELER & CORTIS,

Proctors for the Atlas Steamship Company, Limited :

GENTLEMEN—You will to please take notice that on Monday, the 9th day of December, 1895, at the opening of the Court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Yours, &c.,

J. LANGDON WARD,

Proctor for Climaco Calderon and of Counsel.

Service of a copy of the foregoing notice and of the petition for writ of *certiorari* this, 22d day of November, 1895, is hereby admitted.

WHEELER & CORTIS,

Proctors for The Atlas Steamship Company (Limited).

6777

DEC 10 1895

JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

CLIMACO CALDERON

*against*THE ATLAS STEAMSHIP COMPANY
(Limited).

803

348 R

To the Supreme Court of the United States :

The answer of the Atlas Steamship Company, Limited, to the petition of Climaco Calderon for a writ of *certiorari*, respectfully shows to this Court :

First.—This respondent and appellee admits that the clauses specified in said petition are to be found in the bill of lading mentioned in said petition, but for greater certainty respecting the terms thereof it craves leave to refer to a copy of the same, which is annexed to the libel, and is contained in the certified copy of the record in the Circuit Court of Appeals in this case, which has been filed in this Court.

Second.—This respondent denies the allegations of the eighth article of the petition as to the decision of the District Court of the United States for the Southern District of New York. Respondent maintained, and through its counsel argued, in said Court that the evidence in this case showed that the petitioner had assented to the provisions and conditions printed on the back of said bill of lading, which were referred to on the

face thereof, and by the language on its face incorporated therein. It was also maintained and argued in said District Court that under the language of the ninth clause of the bill of lading referred to in the third article of the said petition, respondent had successfully maintained its defence, because it had shown reasonable diligence in looking for the goods in question at the port of Savanilla, which was one of numerous ports at which the steamships of this respondent touched, and had also shown that it was well known to the libellant that the steamships of respondent formed part of a regular line for transportation of mails and passengers, as well as freight, and touching at various ports in the West Indies and South America, and that it was impracticable always to deliver goods at the first port of delivery without waiting there so long as to interfere with the regular times of sailing from other ports, and that to meet these exigencies of the transit, this particular clause and other clauses had been introduced in said bill of lading. On this point the decision in the District Court was adverse to the respondent. The same point was argued in the Circuit Court of Appeals, and was not disposed of by that Court. On the argument of the appeal in said Circuit Court of Appeals this respondent also referred to the numerous cases in this Court, and in other federal Courts, sustaining the validity of limitations as to the amount of the recovery, and particularly the case of *Hart vs. Pennsylvania R. R.*, reported in 112 U. S. Rep., 331; and *Railroad Co. vs. Fraloff*, 100 U. S., 24. It was also argued that all contention as to whether or not the libellant had accepted the bill of lading or was bound by the clauses therein, was precluded by the admission in the libel that the libellant received for the goods transported "three bills of lading, receipts and contracts, all of like tenor and date," wherefore a copy was annexed to said libel.

Third.—Ever since the decision of this Court in the case of *York Co. vs. Central R. Co.*, 3 Wall., 107, it has been, as this respondent is advised by its counsel, and verily believes, well settled that shippers are bound by the terms of bills of lading delivered to them, whether they examine such terms or not. In point of fact bills of lading as issued by this respondent, and over regular transportation lines, are well known commercial documents, the terms and stipulations of which have been the subject of conference on many occasions between various commercial bodies, such as the Chambers of Commerce in various ports, including the port of New York, representing the shippers of cargo; and committees from the various lines of common carriers, and the general character and nature of such terms and stipulations is well understood by shippers as well as carriers.

Fourth.—This respondent is advised and believes that said judgment of the said U. S. Circuit Court of Appeals is not erroneous, and that under the decisions of this Court the case does not present questions which should be certified to this Court for its review and determination.

WHEREFORE, this respondent respectfully prays that the prayer of the petition may be denied, and that said petition may be dismissed.

THE ATLAS STEAMSHIP
COMPANY (Limited),

by

H. G. KELLOCK,

Agent.

EVERETT P. WHEELER,

Proctor and Advocate

for the Respondent.

Southern District of New York, ss.:

HENRY GREY KELLOCK, being duly sworn, deposes and says : That he is the duly authorized attorney in fact, in the city of New York, of the respondent in the above-entitled action, and that the foregoing answer is true, to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

H. G. KELLOCK.

Subscribed and sworn to, this }
9th day of December, 1895, }
before me.

[SEAL.] CHAS. S. HAIGHT,
Notary Public,
Kings Co.,

Certif. filed in N. Y. Co.

Supreme Court of the United States.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY,
(LIMITED,)
Respondent-Appellee.

BRIEF IN SUPPORT OF THE PETITION OF CLIMACO CALDERON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of Facts.

The references are to the certified transcript of the record in the United States Circuit Court of Appeals for the Second Circuit herewith submitted.

In July, 1893, the libellant delivered to the respondent twenty-six bales and three crates of duck uniforms for transportation by the steamship "Ailsa" from New York to Savanilla, thence by rail to Barranquilla, there to be delivered to the Collector of Customs, for which the respondent issued its bill of lading (fol. 15 *et*

seq.). This bill contained on its face the following provision :

“ And finally, in accepting this bill of lading,
 “ the shipper, owner and consignee of the goods
 “ and the holder of the bill of lading agree to be
 “ bound by all of its stipulations, exceptions and
 “ conditions, as printed on the back hereof,
 “ whether written or printed, as fully as if they
 “ were all signed by such shipper, owner, con-
 “ signee or holder ” (fol. 20).

On the back of the bill of lading, among numerous other clauses, was printed the following :

“ 1. It is also mutually agreed that the car-
 “ rier shall not be liable for gold, silver, bullion,
 “ specie, documents, jewelry, pictures, embroid-
 “ eries, works of art, silks, furs, china, porcelain,
 “ watches, clocks, or for goods of any descrip-
 “ tion which are above the value of \$100 per
 “ package, unless bills of lading are signed
 “ therefor, with the value therein expressed, and
 “ a special agreement is made ” (fol. 28).

And :

“ 14. This agreement is made with reference
 “ to, and subject to, the provisions of the U. S.
 “ Carriers' Act, approved February 13th, 1893 ”
 (fol. 39).

The goods were not landed at Savanilla, but were brought back to New York and reshipped on the “ Alvo,” which was lost at sea on the voyage with all on board.

No notice of the return and reshipment of the goods was given to the libellant (fols. 9, 41). The actual value of the goods lost was \$5,413.18.

The District Court held the respondents liable for the loss of the goods, but also held that the recovery must be limited to \$2,900, under the condition printed on the back of the bill of lading and above quoted (fols. 196-8).

From this portion of the decree the libellant appealed. The assignments of error are at page 52.

The Circuit Court of Appeals have rendered a decision affirming the decree of the District Court (p. 55), Judge WALLACE dissenting (p. 57).

POINTS.

First. It is respectfully submitted that this is a case which it is fitting should be brought before this Court for its adjudication, *first*, because the real party in interest as appellant is the United States of Colombia, a foreign nation, friendly to the United States; *second*, because the decision of this cause will have a wide and far-reaching effect upon all those interested in the carriage of goods at sea, whether shippers or carriers, establishing or denying the right of a carrier by his own act, and in accordance with his own will, to limit his responsibility for the safe carriage of goods entrusted to him in such manner as he may see fit by a clause printed on the back of his bill of lading to which the shipper's attention is not called, and his assent is not asked, and *third*, because the decisions of both the District Court, and the Circuit Court of Appeals are seemingly in direct opposition to the decision of this Court, as will presently be shown.

Second. It is to be observed at the outset that the direct cause of the loss of the goods in question was

the negligence of the carrier in failing to land them at their port of destination. This was decided in the District Court, and the respondent did not appeal.

Third. The error committed by both the Courts below was that, having held the respondent for the loss of the goods as resulting from its negligence, they limited its liability to a sum less than the value of the goods, because of a clause in the matter printed upon the back of the bill of lading, as above quoted.

(a) As to this clause it is necessary to consider at the outset that there is neither proof, allegation nor reasonable ground for inference that it was ever brought to the knowledge of the libellant, and there is no suggestion of his assent to it, express or otherwise. The only evidence in this regard is that within three or four years the libellant had made perhaps ten shipments of goods by the respondent's line, and that on each occasion he had received a similar bill of lading (fols. 83, 84).

(b) While it is settled law that a common carrier may by express contract limit his common-law liability for goods entrusted to him, it is also settled law, as was said in *Ayres vs. Western R. Corporation*, 14 Blatch., 9, that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier modifying the liability of the latter. A rule which, as is said in the same case, is capable of certain and easy application, and if adhered to will go far to abrogate a class of contracts to which practically the carrier is the only party.

The case is, therefore, precisely within :

Railroad Co. vs. Manufacturing Co., 16 Wall., 318.

It is true that in the case at bar the reference in the

bill of lading to the matters printed on its back is in the following words :

“ And finally, in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder,”

and that in the case cited there was given a receipt for the articles shipped containing the following :

“ Subject to the rules and regulations established by the company, (of) a part of which notice is given on the back hereof.”

The ground of the decision in the case last cited was that conceding the right of the carrier to discharge himself of his common-law liability by special contract, assented to by the shipper, it did not follow that he could do so by any act of his own ; that acceptance of such a receipt as was given did not imply assent to its terms ; that the burden of proof was on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties (or obligations) which the law has annexed to his employment.

It is not perceived that the case at bar differs in principle from the case last cited. In both the receipts given were the acts of the carrier alone. In neither case was there any “ express stipulation by the shipper, either parol or in writing.” Assent by a shipper to an “ agreement ” printed on the back of a bill of lading, though referred to on its face, is no more logically to be implied from his acceptance of the bill than is his assent to a “ condition ” printed on the back of a receipt and referred to on its face, to be implied from his ac-

ceptance of the receipt. The decision of both courts below is therefore in conflict with the decision of this Court in *Railroad Co. vs. Manufacturing Co.*

(c) The learned Judge who formulated the decision of the Circuit Court of Appeals, construing this clause as a limitation of the liability of the respondent to \$100 for each package of goods unless the value was stated in the bill of lading and a special agreement made, says (fol. 222) that the validity of stipulations of this character has been repeatedly upheld by the Supreme Court, and cites

Railroad Co. vs. Fraloff, 100 U. S., 24, 27 ;
Potter vs. Majestic, 60 Fed. R., 624 ;

both cases of passengers' baggage, in the first of which no questions of limitation of liability by stipulation or notice was involved, but this Court said :

“ It is undoubtedly competent for carriers of
“ passengers, by specific regulations, *distinctly*
“ *brought to the knowledge of* the passenger,
“ which are reasonable in their character and not
“ inconsistent with any statute or their duties
“ to the public, to protect themselves against
“ liability as insurers for baggage exceeding a
“ fixed amount in value, except upon additional
“ compensation, proportioned to the risk ; ”

and in the second this Court said :

“ The common-law liability of common car-
“ riers for the safety of baggage of travelers is
“ not exactly defined, but it is not unlimited.
“ * * * The rule which the common law laid
“ down upon this subject is well understood.
“ The contract to carry the person only im-
“ plies an undertaking to transport such a
“ limited quantity of articles as are ordina-
“ rily taken by travelers for their personal use
“ and convenience. * * * And, there-

“fore, as this obligation on the part of the carrier is not unlimited, but is at common law not exactly defined, the carrier has a right ‘by reasonable regulations of which the passenger has knowledge’ to define and make certain to both parties the extent of an implied undertaking to carry baggage, * * * and of an express undertaking where the contract includes baggage by name ; for an express contract which simply mentions baggage would not be construed to mean baggage unlimited in quantity or value.”

Neither case being authority for the proposition to which they were cited, but clearly showing the marked difference between the rules applicable to such cases and to the carriage of goods. And citing also :

Hart vs. Penn. R. R. Co., 112 U. S., 331,

which was a case of express contract in writing signed by the shipper that the property was of a stated value.

It is submitted that these cases are in no sense authority to overrule Railroad Co. vs. Manufacturing Co., *supra*, nor in conflict with that case.

(d) The Circuit Court of Appeals also erred in its interpretation of the clause in question. It reads as follows :

“ 1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroidery, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.”

Exceptions or clauses introduced in favor of one party to the contract, of which he himself is the author, are to be construed most strongly against him. What is ambiguous, what is doubtful, must be construed against the shipowner in whose favor it has been inserted.

There is nothing to require a construction more favorable to the shipowner than the plain meaning of the words imports.

Leggett, Bills of Lading, p. 11.

Burton vs. English, 12 Q. B. D., 218, 224.

The Main, 152 U. S., 122-132.

Furthermore, in the interpretation of written instruments regard must be paid to the context and collocation of phrases, which in case of doubt or ambiguity is controlling. The intent of the parties must be sought in the paper itself and deduced from the expressions used. It is not permitted to speculate in this particular.

The clause under consideration was plainly intended—not to limit, but to exclude, liability on the part of the carrier in a large number of specified cases. If operative, it would be impossible to spell out from it any liability whatever on the part of the respondent for the loss of gold, silver, &c., unless the condition had been complied with.

If by this clause the respondents intended, as they plainly did, to relieve themselves under certain circumstances from any liability whatever for the loss of porcelain, watches or clocks, how can any intention on their part be inferred to remain liable to the extent of \$100 per package for the very next instance of exemption specified. There is no change of phraseology.

The exemption, absolute in the one case designated by the nature of the goods, is equally absolute in the other, defined by the value of the goods enclosed in a single package.

To the average mind it would seem that the respondent had carefully chosen words to effectuate absolute exemption from all liability.

Had the phrase read, "for goods of any description, above the value of \$100 per package," or, "for goods of any description, in excess of \$100 per package," the intention to retain a restricted and limited liability for all other goods than those previously specified would have been plain. This form of expression is also the one most frequently used, and a departure from it is significant. When the respondent inserted the words "which are" it must be presumed to have done so advisedly, to have intended the result which the grammatical construction of the phrase so altered produced.

The sentence—

"It is mutually agreed that the carrier shall
"not be liable for goods of any description
"which are above the value of \$100 per pack-
"age, unless, &c.,"

is certainly not paraphrased by the sentence,

"It is mutually agreed that the carrier shall
"be liable for all goods, but only to the extent
"of \$100 per package, unless, &c."

The exemption in terms is from all liability for any goods which are put up in a package, if the contents of the package are worth more than one hundred dollars. This is the plain meaning of the contract (if it is a contract) as made. To say that the parties intended only an exemption for any excess in value over \$100 per package is to make a new contract for them, to which one party, at least, never assented by word or deed.

The clause in question is a creation of the respondent. In its framing the libellant had no part or voice. If it affects the libellant at all, it is because of his receipt of the bill of lading with this clause printed on

its back. It contains matter in derogation of the common-law rights of the libellant. He may therefore properly insist that it shall be literally and strictly construed as against the respondents, and stand or fall according to its legality or illegality upon such construction.

Upon its face this clause purports to exonerate the respondent from all liability for the loss of goods under certain circumstances, even though, as in this case, resulting from its own fault or negligence.

It is therefore unreasonable.

Railroad Co. vs. Lockwood, 17 Wall., 357.

And unlawful.

Act of Feby. 13, 1893.

Fourth. One further consideration presents itself. The contract between the parties was for the transportation of the libellant's goods by sea from New York to Savanilla. Whatever provisions it contained referred solely to matters within the contracted voyage. Granting that the limitation of liability is as the Court below has said, that limitation referred only to occurrences during the transportation contemplated. When the vessel left Savanilla with the goods on board the contractual relation between the parties ceased. The respondent became from that moment bailee in its own wrong of the libellant's goods. It was, therefore, the absolute guarantor of their safety to the full extent of their value.

Ellis vs. Turner, 8 Term. Rept., 531.

Story on Bailments, § 509.

Fifth. The attention of the Court is earnestly requested to the dissenting opinion of Judge WALLACE (p. 57) as presenting more forcibly than we can hope to do the errors below.

Sixth. The writ of *certiorari* should issue as prayed.

J. LANGDON WARD,
Of Counsel.

[4215]

Supreme Court of the United States.

CLIMACO CALDERON,
Libellant, Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY,
LIMITED,
Respondent, Appellee.

BRIEF FOR THE APPELLANT.

This cause comes up on *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Case.

In July, 1893, the appellant delivered to the respondent twenty-six bales and three crates of duck uniforms of the value of fifty-four hundred and thirteen $\frac{18}{100}$ dollars, for transportation by the steamship "Ailsa" from New York to Savanilla and from thence by rail to Barranquilla in the United States of Colombia, there to be delivered to the Collector of Customs.

These goods were delivered to the respondent by a truckman to whom the respondent gave a receipt (Ex. 3, p. 30) containing the words: "At the shipper's risk from fire, and *subject to the conditions* expressed in the company's form of bill of lading," &c. This receipt was afterwards surrendered to the appellee and a bill

of lading for the goods was issued to the appellant (pp. 24, 26).

This bill of lading (p. 26) commencing in the usual form with an acknowledgment of the receipt of the goods in apparent good order and condition, contains the following :

“ And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.”

Upon the back of this bill of lading was printed a long endorsement which, after specifying certain things the ship might lawfully do, and certain cases in which the carrier should escape liability, proceeds (p. 28) :

“ 1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made ” (p. 23).

“ 9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the Company's expense, the steamer not to be held liable for any claim for delay or otherwise ” (p. 29).

14. This agreement is made with reference to and subject to the provisions of the U. S. carrier's act, approved February 13th, 1893.

The goods in question were delivered on board the "Ailsa" shortly before the ship sailed, were the last goods put on board the ship, and were stowed in No. 3 hatch with cargo consigned to Carthagena (p. 25). At Savanilla the goods were not discharged; no apparent effort was made to find them; the fact that they had not been discharged as they should have been was not discovered until the ship arrived at Carthagena (pp. 9, 12); and then they were brought back to New York and reshipped on the "Alvo" (pp. 10, 14), which was lost at sea with all on board (p. 15).

No notice of the non-delivery, return, or reshipment of the goods was given the libellant (Libel, par. Third p. 1; Admitted Answer, par. First, p. 7).

Thereupon the libel in this cause was exhibited in the District Court for the Southern District of New York, to recover the value of the lost goods.

The District Court held that, inasmuch as the failure to deliver the goods at Savanilla, upon the evidence, resulted either from negligence in their stowage with reference to the convenient finding and delivery of them at the port of call, or in the search made for them at the time, it could not be excused under the ninth paragraph of the conditions endorsed on the bill of lading because of the provision in the Harter Act that it:

"Shall not be lawful to insert in any bill of lading any agreement whereby the owner shall be relieved from liability for loss or damage arising from negligence, fault or failure in the proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge; and any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null, void and of no effect" (p. 33),

and held the respondent liable, but held also that its liability was limited to one hundred dollars for each

package of goods shipped under paragraph 1 of the conditions printed on the back of the bill of lading (p. 35), and a decree was entered accordingly.

From this decree the libellant appealed to the United States Circuit Court of Appeals for the Second Circuit. The assignment of errors is found at page 36 of the Record. The respondent did not appeal. The Circuit Court of Appeals by Mr. Justice LACOMBE (Mr. Justice WALLACE dissenting) rendered a decision affirming the decree of the District Court, and thereupon the libellant sued out a writ of *certiorari* from this Court.

Specification of Errors.

The Courts below erred in holding :

FIRST. That the libellant was bound by " the stipulations, exceptions and conditions " printed upon the back of the bill of lading.

SECOND. That, of said stipulations, exceptions and conditions, the clause numbered 1, and in part in the words and figures following, to wit : " The carrier shall not be liable for gold, silver, bullion * * * or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made " was a reasonable condition, binding upon the libellant, and to be construed as a limitation of the respondent's liability to the sum of one hundred dollars for each package of the libellant's goods.

THIRD. That the libellant was limited in his recovery to the sum of one hundred dollars for each package of his merchandise lost.

FOURTH. In affirming the decree of the District Court.

Brief of the Argument.

First. It must be kept in mind that the decree of the District Court, from which the respondent did not appeal, establishes negligence on the part of the respondent as the cause of the loss, with a resulting liability to the libellant. These questions are not open. The subject for consideration now is whether that liability is co-extensive with the libellant's loss, or is limited to a fractional part of it.

Second. The libellant was in no way bound by any matter printed upon the back of the bill of lading purporting to limit in any respect the common law liability of the respondent as a common carrier in respect of goods intrusted to it for carriage.

(a) As to such matter it is necessary to consider at the outset that there is neither proof, allegation nor reasonable ground for inference that it was ever brought to the knowledge of the libellant, and there is no suggestion of his assent to it, express or otherwise. The only evidence in this regard is, that, within three or four years, the libellant had made perhaps ten shipments of goods by the respondent's line, and that on each occasion he had received a similar bill of lading (p. 14).

(b) While it is settled law that a common carrier may by express contract limit his common-law liability for goods entrusted to him, it is also settled law, as was said in *Ayres vs. Western R. Corporation*, 14 Blatch., 9, that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier modifying the liability of the latter. A rule which, as is said in the same case, is capable of certain and easy application, and

if adhered to will go far to abrogate a class of contracts to which practically the carrier is the only party.

The case is, therefore, precisely within :

Railroad Co. vs. Manufacturing Co., 16 Wall., 318.

It is true that in the case at bar the reference in the bill of lading to the matters printed on its back is in the following words :

“ And finally, in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder,”

and that in the case cited there was given a receipt for the articles shipped containing the following :

“ Subject to the rules and regulations established by the company (of), a part of which notice is given on the back hereof.”

The ground of the decision in the case last cited was that, conceding the right of the carrier to discharge himself of his common-law liability by special contract, assented to by the shipper, it did not follow that he could do so by any act of his own ; that acceptance of such a receipt as was given did not imply assent to its terms ; that the burden of proof was on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties (or obligations) which the law has annexed to his employment.

It is not perceived that the case at bar differs in principle from the case last cited. In both the receipts

given were the acts of the carrier alone. In neither case was there any "express stipulation by the shipper, either by parol or in writing." Assent by a shipper to an "agreement" printed on the back of a bill of lading, though referred to on its face, is no more logically to be implied from his acceptance of the bill than is his assent to a "condition" printed on the back of a receipt and referred to on its face, to be implied from his acceptance of the receipt.

(c) The learned Judge who formulated the decision of the Circuit Court of Appeals, construing the first clause of the matter printed on the back of the bill of lading as a limitation of the liability of the respondent to \$100 for each package of goods unless the value was stated in the bill of lading and a special agreement made, says (p. 38) that the validity of stipulations of this character has been repeatedly upheld, and cites

Railroad Co. vs. Fraloff, 100 U. S., 24, 27;
Potter vs. Majestic, 60 Fed. R., 624;

both cases of passengers' baggage, in the first of which no question of limitation of liability by stipulation or notice was involved, but this Court said :

" It is undoubtedly competent for carriers of
" passengers, by specific regulations, *distinctly*
" *brought to the knowledge* of the passenger,
" which are reasonable in their character and
" not inconsistent with any statute or their
" duties to the public, to protect themselves
" against liability, as insurers, for baggage
" exceeding a fixed amount in value, except
" upon additional compensation, proportioned
" to the risk."

And in the second this Court said :

" The common-law liability of common car-
" riers for the safety of baggage of travelers

" is not exactly defined, but it is not unlim-
 " ited. * * * The rule which the common
 " law laid down upon this subject is well under-
 " stood. The contract to carry the person only
 " implied an undertaking to transport such a
 " limited quantity of articles as are ordinarily
 " taken by travelers for their personal use and
 " convenience. * * * And, therefore, as this
 " obligation on the part of the carrier is not un-
 " limited, but is at common law not exactly de-
 " fined, the carrier has a right 'by reasonable
 " ' regulations of which the passenger has
 " ' knowledge' to define and make certain to
 " both parties the extent of an implied under-
 " taking to carry baggage, * * * and of an
 " express undertaking where the contract in-
 " cludes baggage by name; for an express con-
 " tract which simply mentions baggage would
 " not be construed to mean baggage unlimited
 " in quantity or value."

Neither case being authority for the proposition to which they were cited, but clearly showing the marked difference between the rules applicable to such cases and to the carriage of goods.

The learned Judge, in support of his position, cited also

Hart vs. Penn. R. R. Co., 112 U. S., 331,
 in which this Court held that an express contract in writing signed by the shipper, by which the value of merchandise shipped was fixed at a sum certain, was valid and operative in case of loss to prevent a larger recovery.

It is submitted that these cases are in no sense authority to overrule Railroad Co. vs. Manufacturing Co., *supra*, or in conflict with that case.

Third. If it be assumed that the libellant was bound by the stipulations and conditions printed on the back of the bill of lading, still no one of them, nor all together, were effective to limit the liability of the respondent in the cause at bar, because, here the loss was the result of the respondent's negligence.

"It is the law of this Court that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants."

Hart vs. Penn. R. R. Co., 112 U. S., 331-338.

Congress, in its wisdom, enacted a statute declaratory of the law as settled by this Court, when it passed the Act of February 13, 1893, being Chapter 105 of the Acts of the Second Session of the Fifty-second Congress, Sections 1 and 2 of which read as follows:

"That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement, whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agents or manager, to insert in any bill of lad-

ing or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

It follows, therefore, that whatever the actual intent of the respondent may have been in drafting these stipulations and conditions, they must be construed as inapplicable to any case of loss or damage resulting from the negligence of the carrier or its servants, or, if such a construction cannot be given, must be held to be void.

It cannot be said that while a carrier may not stipulate for entire exemption from liability for the consequences of his own negligence, he may, by stipulation, limit such liability to a sum less than the actual damage for which he would be otherwise liable.

To so hold would be to allow that to be done by indirection which the law prohibits. If a carrier may stipulate for a partial though not for entire exemption, what is to be the measure of the liability from which he cannot free himself?

Louisville R. R. Co. vs. Wynn, 88 Tenn., 320.

Fourth. Both Courts below erred in their interpretation of the clause which they held operative to limit the libellant's recovery.

The clause in question reads as follows :

"1. It is also mutually agreed that the
"carrier *shall not be liable* for gold, silver, bul-

“ lion, specie, documents, jewelry, pictures,
 “ embroideries, works of art, silks, furs, china,
 “ porcelain, watches, clocks, or for goods of any
 “ description which are above the value of
 “ \$100 per package, unless bills of lading are
 “ signed therefor, with the value therein ex-
 “ pressed, and a special agreement is made.”

Exceptions or clauses introduced in favor of one party to the contract, of which he himself is the author, are to be construed most strongly against him. What is ambiguous, what is doubtful, must be construed against the shipowner in whose favor it has been inserted.

There is nothing to require a construction more favorable to the shipowner than the plain meaning of the words imports.

Leggett, Bills of Lading, p. 11.
 Burton vs. English, 12 Q. B. D., 218, 224.
 The Main, 152 U. S., 122-132.

Furthermore, in the interpretation of written instruments regard must be paid to the context and collocation of phrases, which in case of doubt or ambiguity is controlling. The intent of the parties must be sought in the paper itself and deduced from the expressions used. It is not permitted to speculate in this particular.

The clause under consideration was plainly intended, not to limit, but to exclude, liability on the part of the carrier in a large number of specified cases. If operative, it would be impossible to spell out from it any liability whatever on the part of the respondent for the loss of gold, silver, &c., unless the condition had been complied with.

If, by this clause, the respondents intended, as they plainly did, to relieve themselves under certain circumstances from any liability whatever for the loss of porcelain, watches or clocks, how can any intention on their part be inferred to remain liable to the extent of

\$100 per package for the very next instance of exemption specified. There is no change of phraseology.

The exemption, absolute in the one case, designated by the nature of the goods, is equally absolute in the other, defined by the value of the goods enclosed in a single package.

To the average mind it would seem that the respondent had carefully chosen words to effectuate absolute exemption from all liability.

Had the phrase read "for goods of any description, above the value of \$100 per package," or "for goods of any description, in excess of \$100 per package," the intention to retain a restricted and limited liability for all other goods than those previously specified would have been plain. This form of expression is also the one most frequently used, and a departure from it is significant. When the respondent inserted the words "which are," it must be presumed to have done so advisedly, to have intended the result which the grammatical construction of the phrase so altered produced.

The sentence

"It is mutually agreed that the carrier shall
"not be liable for goods of any description
"which are above the value of \$100 per package,
"unless," &c.,

is certainly not paraphrased by the sentence,

"It is mutually agreed that the carrier shall
"be liable for all goods, but only to the extent
"of \$100 per package, unless," &c.

The exemption in terms is from all liability for any goods which are put up in a package, if the contents of the package are worth more than one hundred dollars. This is the plain meaning of the contract (if it is a contract) as made. To say that the parties intended only an exemption for any excess in value over \$100 per

package is to make a new contract for them, to which one party, at least, never assented by word or deed.

The clause in question is a creation of the respondent. In its framing the libellant had no part or voice. If it affects the libellant at all, it is because of his receipt of the bill of lading with this clause printed on its back. It contains matter in derogation of the common-law rights of the libellant. He may, therefore, properly insist that it shall be literally and strictly construed as against the respondents, and stand or fall according to its legality or illegality upon such construction.

Upon its face this clause purports to exonerate the respondent from all liability for the loss of goods under certain circumstances, even though, as in this case, resulting from its own fault or negligence.

It is, therefore, void under

Railroad Co. vs. Lockwood, 17 Wall., 357.
Act of Feby. 13, 1893.

Fifth. One further consideration presents itself. The contract between the parties was for the transportation of the libellant's goods by sea from New York to Savanilla. Whatever provisions it contained referred solely to matters within the contracted voyage. Granting that the limitation of liability is as the Court below has said, that limitation referred only to occurrences during the transportation contemplated. When the vessel left Savanilla with the goods on board the contractual relation between the parties ceased. The respondent became, from that moment, bailee in its own wrong of the libellant's goods. It was, therefore, the absolute guarantor of their safety to the full extent of their value.

Ellis vs. Turner, 8 Term. Rept., 531.
Story on Bailments, § 509.

Sixth. The decree of the District Court should be reversed and the cause remanded to that Court with instructions to allow the libellant the full value of the goods lost, as his damages in respect of the matters in the libel herein set forth.

J. LANGDON WARD,
Of Counsel for Appellant. :

[10016]

1: 806. 378 8
Brief of Wheeler for Opposite
Filed Dec. 16, 1895.

RECEIVED
JAMES H. Mc

Supreme Court of the United States.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY
(Limited),
Respondent-Appellee.

806

Brief for Respondent in Opposition to Motion for Certiorari.

Statement.

The libel alleges (p. 2, fol. 7) the delivery of twenty-seven bales and three crates of duck uniforms to the Atlas S. S. Co., and that libellant "received therefor three bills of lading, receipts and contracts, all of like tenor and date, whereof a copy is hereto annexed, marked A."

The bill of lading was put in evidence by libellant (p. 14, fol. 55).

The steamer sailed July 19, 1893 (p. 33, fol. 129). The goods were delivered between eleven and twelve o'clock of that day. They arrived too late to be put with the

other Savanilla cargo. "It was just the last minute.
* * * They were the last goods put in" (p. 35, fols. 137-140).

On the delivery of the goods a receipt for them was given "subject to the conditions expressed in the company's form of bill of lading" (p. 43, fol. 169). Libellant received the bills of lading "not later than one o'clock, and forwarded them by the same steamer" (p. 34, fol. 133).

Libellant had shipped goods, at least, ten times on similar bills of lading (pp. 21, 22, fols. 84, 85).

The Atlas steamers had been running on the same route to Carthagená and Savanilla, and on the same schedule for about three years (p. 21, fol. 82). The usual course of that route was "first to Kingston, then to Savanilla, then to Carthagená and Port Limón, and then back to New York direct" (p. 21, fols. 81, 82; p. 15, fol. 59). On that route the steamers carry cargo, passengers, specie and mails (p. 21, fol. 82).

The mistake in not delivering the cases of uniforms at Savanilla was not discovered until the steamer had left that port, and about an hour before the discharge of Carthagená cargo (p. 16, fol. 62; p. 18, fol. 71 and 72; p. 19, fol. 74). The cause of the mistake was that the cases had been "stowed amongst the Carthagená cargo" (p. 16, fol. 63; p. 18, fol. 71).

The cargo could not be landed at Carthagená because the law there does not allow the landing of cargo not on the manifests, and it was impracticable to forward the goods from there (pp. 16, 17, fols. 64, 65). The steamer could not return to Savanilla, because she was "timed to be at Limón at a certain day to take up a perishable cargo that was waiting" (p. 17, fol. 66).

The steamers have regular sailing days from these different ports. The return cargo at that season from

Port Limon is bananas, and punctuality in sailing on the schedule time is, therefore, essential (p. 25, folia. 98, 99).

POINTS.

First.

The case is not one in which, under the well settled practice of this Court, a certiorari should issue. The rule on this subject is clearly stated in *American Construction Co. vs. Jacksonville, &c., Railway Co.*, 148 U. S., 372. At page 382 the Court say :

"The Act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgment of that Court final, except in extraordinary cases."

The case at bar is not extraordinary. It involves a controversy between a shipper and a carrier as to the latter's liability for loss of cargo. Such suits are frequent. They mainly involve, as does this, either the application of well settled rules of law or questions of fact. They arise frequently ; but no more frequently than all questions under bills of lading, negotiable paper and other commercial contracts. In short, every argument that can be presented for a review on certiorari of the decision in this case would apply to all questions arising under such contracts. In one sense they are important. Congress endeavored to provide at the

beginning of the Government one central tribunal which should, in the last resort, decide them all. So many cases, however, arose in which the exercise of this jurisdiction was invoked, that it broke down under its own weight, and therefore the act of March 3, 1891, Chapter 517, was passed. Of this Act this Court say :

American Construction Co. vs. Jacksonville, &c., Railway Co., 148 U. S., 372, 382.

“The primary object of this Act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this Court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation ; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this Court and those, according to the scheme of the Act, the entire appellate jurisdiction from the Circuit and District Courts of the United States. *McLish vs. Roff*, 141 U. S., 661, 666, 894 ; *Re Lau Ow Bew*, 141, U. S., 583 and 144 U. S., 47.

Second.

The case in the Court below turned wholly upon the construction of particular clauses in a bill of lading. No general question of law was involved.

It is well settled that a clause in a bill of lading, limiting the amount of the recovery to \$100 per package, is valid.

Hart vs. Pennsylvania R. R., 112 U. S., 331.

At page 340, the Court say :

"There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take, at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss ; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

In this case there was no definite valuation of the horses in question. The clause in controversy read :

"The carrier assumes a liability on the stock to the extent of the following agreed valuation :

"If horses or mules, not exceeding \$200 each."

This could not be called a valuation of a particular horse. It fixed nothing but the limit of liability. The carrier could have proved that the animal was worth less than the amount stated.

Muser vs. Holland, 17 Blatch., 412.

At p. 414 Mr. Justice WALLACE says :

"The right of a carrier to exact fair information as to the value of property confided to his care has always been recognized. He has the right to insist that his compensation be measured by his risk, and, obviously, the degree of care which he will exercise will measurably depend upon the extent of the responsibility he may incur. While it is not primarily the duty of the shipper to inform the carrier of the nature or value of the contents of the parcel sent, the carrier has the right to make inquiry and receive a true answer ; and any

concealment on the part of the shipper, intended to mislead the carrier as to the character or value of the property, and which does mislead, is a fraud, which absolves the carrier from responsibility."

To the same effect are :

- Ernest *vs.* Express Co., 1 Woods, 573.
- Hopkins *vs.* Westcott, 6 Blatch., 64.
- Kidd *vs.* Greenwich Ins. Co., 35 Fed. Rep., 351.
- The Bermuda, 29 Fed. Rep., 399.
- Aff'g S. C., 27 *Ibid*, 476.
- The Denmark, 27 *Ibid*, 141.
- Green *vs.* Boston & Lowell R. R., 128 Mass., 221.

The validity of a similar clause in a telegraph blank was sustained in *Primrose vs. Penn. R. R.*, 154 U. S., 1. At p. 15 the Hart case is quoted and approved.

The validity of a similar limitation in contracts for the carriage of passengers and their baggage is equally well settled.

Railroad Co. vs. Fraloff, 100 U. S., 24, 27.

There is no distinction on principle between these cases and the one at bar. They all rest on the solid foundation of allowing parties either by contract or notice to define the limit of an undefined liability. Market value is always an uncertain quantity. The place of ascertainment is often in doubt, and it must always rest on evidence as to quality, which the shipper alone can give; and which ordinarily the carrier cannot refute.

The passage money of the passenger is freight, and subject to the same rules as money paid for carrying cargo.

The Main, 152 U. S., 122.

These baggage cases are therefore in point.

Third.

It is equally well settled that the clauses printed on the back of the bill of lading in this case form a part of it, because they are, by express language, incorporated in it and are signed by the agents for respondent.

Petition for Certiorari, p. 2 ; Record p. 5,
fol. 20 ; p. 10, fol. 39.

1. It is not to be supposed that the Courts intend to apply to carrier's contracts any different rule from that applicable to other contracts, so far as the question of what is to be treated as part of the contract is concerned.

It was formerly the practice not to include in the body of the mortgage the defeasance clause. The mortgage was an absolute deed with a defeasance endorsed upon it. No one would contend that in such case the defeasance, although endorsed, or contained in a separate instrument, would not be a part of the contract.

Harrison *vs.* Trustees, 12 Mass., 463.
Morgan's Assignee *vs.* Shinn, 15 Wall., 105.
Bell *vs.* Bruen, 1 How., 169, 183.
1 Greenl. Evid., Sect. 283.

So, if words expressing a delivery in escrow were endorsed upon a deed delivered with it, or embraced in another paper, can there be a doubt they would qualify the delivery ?

Stanton *vs.* Miller, 58 N. Y., 192, 203.
County of Calhoun *vs.* American Emigrant
Co., 93 U. S., 124.

If the carrier delivers to the shipper an instrument

which is evidently intended as a whole, and which is obviously not a mere receipt, but is intended to embody a statement of the entire terms of the contract, it seems irrelevant to the inquiry as to what the contract is, whether a particular clause is printed on the back or on the face.

The libellant cites expressions of Mr. Justice Davis in *Railroad Co. vs. Manufacturing Co.*, 16 Wall., 318, to the effect that certain endorsements upon a carrier's receipt were not to be regarded. In that case the character of the instrument delivered by the carrier to the shipper was essentially different from that in this. It was a mere receipt, and not a contract. There was nothing in its character to indicate that the matter printed upon the back was an intrinsic part of the contract. Judge Davis draws special attention to the fact that it was not signed by the carrier, and calls it a mere notice.

In any case, that decision must be considered as overruled by this Court, in

Myrick vs. Michigan Central R. R. Co.,
107 U. S., 102.

In this case the paper delivered to the shipper was a mere receipt for cattle "for transportation by the Michigan Central Railroad Company, to the warehouse at" On the margin was the following :

"This receipt can be exchanged for through bill of lading.

NOTICE.—See rules of transportation on the back hereof."

On the back of the receipt the rules were printed, one of which (the 11th) contained a stipulation,

"The Company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the Company."

At page 108 the Court say :

"Though this rule brought to knowledge of the shipper might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company."

The decision was followed and approved in

North Penn. R. R. *vs.* Commercial Bank,
123 U. S., 727.

This was a case arising upon the same bill of lading, but against a different carrier. In both cases the Court held that the carrier receiving the freight was not liable, but that the carrier at the terminus of the route was liable for non-delivery of the cattle. It is true that the Court also held that this would be the rule of law in the absence of any contract. But in determining what the contract between the parties actually was, the Court does consider and give weight to this endorsement upon the receipt for the cattle, and treat it as rebutting the inference from other language, upon the face of the contract itself. That is all we ask the Court to do in this case.

2. The bill of lading was issued after goods were shipped, but the shipping receipt expressed that the goods were received on the terms stated in the bill of lading. This of itself was sufficient to constitute a contract to carry on these terms.

Wilde *vs.* Merchants Desp. Trans. Co., 47
Iowa, 272.

But this question does not arise in the case at bar.

No issue is made by the pleadings on the acceptance of the bill of lading. It is alleged in the libel and was proved by the libellant. The contention in his brief, that there was no express evidence of his assent, is, therefore unwarranted by the pleadings, and cannot be made here.

3. Libellant cites expressions in the opinion in *Ayres vs. Western R. R.*, to the effect that "an explicit agreement" on the part of the shipper must be proved. This decision is not controlling here.

(a.) This case was decided solely on the authority of *Railroad Company vs. Manufacturing Co.* That decision has since been limited as before shown, and never applied to limitations of amount.

(b.) The admission in the libel, and the statement in the shipping receipt that the goods were received subject to the conditions in the bill of lading, distinguish that case from the one at the bar.

Fourth.

It is equally well settled that a bill of lading delivered to the shipper expresses the contract between the parties, and that its terms are binding on both the shipper and the carrier, and that its acceptance by the shipper is conclusive evidence of his agreement to its terms.

York Co. vs. Central R. R., 3 Wall., 107.

In this case it was proved (p. 108) "that the cotton

was shipped on the steamer before the bills of lading were signed; that the shipper had not examined the bills; that his attention was not called to the fire clause, and that his firm had no authority to ship for their principals with that exemption." It was also argued that there was no consideration for the exemption. But the Court overruled all the objections, and held that the plaintiff, who was the owner of the goods, was bound by the exemption in the bill of lading.

Evidence of express assent by the shipper to the terms of the bill of lading is unnecessary. In the case at bar, Calderon does not testify that he did not read it, or did not know its terms. But if he had so testified, he would equally be bound by the contract.

York Co. *vs.* Central R. R., 3 Wall., 107.

Kirkland *vs.* Dinsmore, 62 N. Y., 171.

Farnham *vs.* Camden and Amboy R. R.,
55 Penn., 53.

Belger *vs.* Dinsmore, 51 N. Y., 166.

Grace *vs.* Adams, 100 Mass., 505.

The Judges of the Court below did not differ as to any of the questions which have thus far been discussed. Judge Wallace's dissent was wholly on the construction of a particular clause in the bill of lading.

Fifth.

A mere question of the construction of a particular clause in a bill of lading is not one of gravity or importance. The terms of those instruments vary. They

are the subject of frequent discussion in commercial circles and are often changed. The fact that Judge Wallace dissented in the case at bar will lead to a change of the language of the clause in question.

If, however, the Court should consider this point on the present motion, we submit that the decision below was right.

Appellant argues that the clause in question means that the carrier should not be liable *in any amount* for a package worth over \$100 "unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

1. If the clause did mean this it would still be valid. This was expressly adjudged by Mr. Justice Blatchford, in the Second Circuit, on appeal, and has twice been held in the District Court for the Southern District.

The Bermuda, 29 Fed. Rep., 399.

Aff'g S. C., 27 *Ibid*, 476.

The Denmark, 27 *Ibid*, 141.

2. But we cannot admit that the clause is open to the construction contended for. It provides that "the carrier shall not be liable for gold * *, or for goods of any description, which are above the value of \$100 per package, unless," etc.

If gold, which is exempted by name, were put in the same package with other articles, no one would claim that the others were exempt. The gold only would be excluded. So when goods making the value over \$100 are packed with goods of that value, the latter are not exempt. The former are.

Where goods are exempted by description, that description is exempt. When they are exempted by value, all over the value specified, are exempt. But how can

it be said that the parties intended to exempt goods which were worth less than the specified value?

The decree below charged the appellee with no liability for any goods in each package which were "above the value of \$100 per package."

Sixth.

Harter Act.

The Carriers' Act of February 13, 1893, known as the Harter Act (27 Stat., 505), does not affect the validity of stipulations limiting the amount of recovery, or making it the duty of shippers to disclose the value, or character of goods. The object of all such clauses is to compel fairness on the part of the shipper. The "Carrier's reward ought to be proportionable to the risk."

Gibbon *vs.* Paynton, 4 Burr., 2298; cited and approved,

Hart *vs.* Penn. R. R. Co., 112 U. S., 331, 341.

The amount of this reward is not touched by the Harter Act, and, therefore, the amount of the recovery is not.

That Act was passed in order to establish beyond controversy the validity of certain clauses in bills of lading, and the invalidity of others. On these points there was a distressing conflict of authority which is now ended. There is nothing in its language or its history which tends to show that it was intended to abrogate the reasonable limitation of the amount of liability, in proportion to the risk and the reward.

Nothing can illustrate this proposition better than the Hart case. For the same Court which, in *Railroad Co. vs. Lockwood*, held a stipulation to be void which altogether exempted the carrier from liability for the negligence of his servants, in the Hart case sustained the validity of a limitation as to amount, although the loss in that case was caused by negligence.

Seventh.

Deviation.

The appellant argues that the clause in question does not apply to the case at bar, because the loss occurred after the steamer left Savanilla. To this we reply :

1. The recovery is not for a loss incurred by deviation, but for negligence in not making more thorough search for the goods at Savanilla.

Clause 9, of the bill of lading, allows goods to be over-carried. It was inserted with reference to the usual course of business to which reference has been had.

The necessities of proper stowage and distribution of a mixed cargo, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call. The ship being under the necessity of delivering mails and passengers with punctuality and despatch, and of avoiding delays that would be destructive to cargoes of perishable fruit, cannot overhaul all its cargo at every port of call.

All carrier's contracts are made with reference to the usage of the trade as to stowage.

Baxter vs. Leland, 1 Abb. Adm., 348.

The Colonel Ledyard, 1 Sprague, 530.

Barber vs. Brace, 3 Conn., 9, 13.

This is admitted in

The Delaware, 14 Wall., 579, 598, 606.

Usage in reference to the manner of delivery is binding upon both parties.

Richmond *vs.* Union Steamboat Co., 87 N. Y., 240.

Homesly *vs.* Elias, 66 N. C., 330.

Adams Ex. Co. *vs.* Darnell, 31 Ind., 20.

Salter *vs.* Kirkbride, 4 N. J. Law Rep., 223, 229.

McMasters *vs.* Penn. R. R., 69 Penn., 374.

The Tybee, 1 Woods, 358.

Hooper *vs.* Chicago & N. W. R. Co., 27 Wis., 81.

Whitehouse *vs.* Halstead, 90 Ill., 95.

It is also binding when it relates to the method of transportation.

Robertson *vs.* Nat. S. S. Co., 139 N. Y., 416.

In the case at bar, this usage explains clause 9, and shows that it was intended to allow just what happened here. The learned District Judge held that this clause did not constitute a defense because of the carrier's failure to prove diligence in searching for the goods at Savanilla. Assuming, for the argument, that this is a sufficient reply, it still proves that the recovery is because of the negligence and not because of the deviation.

2. The authorities as to recovery by the shipper, where there has been a deviation (with one exception, to be considered hereafter), do not touch the effect of clauses limiting the amount of recovery. They do not,

on principle. The reason of the decisions on the latter clauses, stated under the Second Point, are equally applicable to a loss from deviation. If the appellee had been notified of the actual value of these uniforms, it would have bestowed more care upon the search at Savanilla. All care involves expense, and for expense there should be a proportionate reward.

3. The only case cited for libellant on this point is
Ellis *vs.* Turner, 8 Term Rep., 531.

To this there are several replies :

- a.* The English cases on carriers decided during the last century, have been so modified by the recent decisions that they cannot be cited as authority.

- b.* In that case there was an express agreement to deliver at the first port of call, and an express and wilful refusal to deliver there. On these two grounds the decision is based.

- c.* In that case there was no written contract, but only a posted notice, never seen by plaintiff.

4. The argument was much pressed in the Court below, that the effect of the deviation was to vitiate the insurance. This, however, would depend upon the form of the policy. If libellant had insured the goods "with all liberties as per bill of lading," the goods would have been covered notwithstanding the failure to deliver them at Savanilla. This is not an uncommon form of insurance. There are numerous routes in which it is of great importance to the carrier to permit what this bill of lading permits, and it is a very simple matter for the shipper to obtain insurance policies, covering such contingencies, as will under these circumstances occasionally arise.

5. In the present case, especially, the limitation was reasonable. The ultimate cause of the loss was that the goods were offered for carriage, too late for proper stowage.

Eighth.

The motion for a certiorari should be denied.

EVERETT P. WHEELER,
Proctor and Advocate for Respondent.

No. 83.

JAN 25 1898
JAMES H. MCKENNEY,
CLERK

Brief of Wheeler for Appellee.
Filed Jan. 25, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 83.

CLIMACO CALDERON,

Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY (LIMITED),

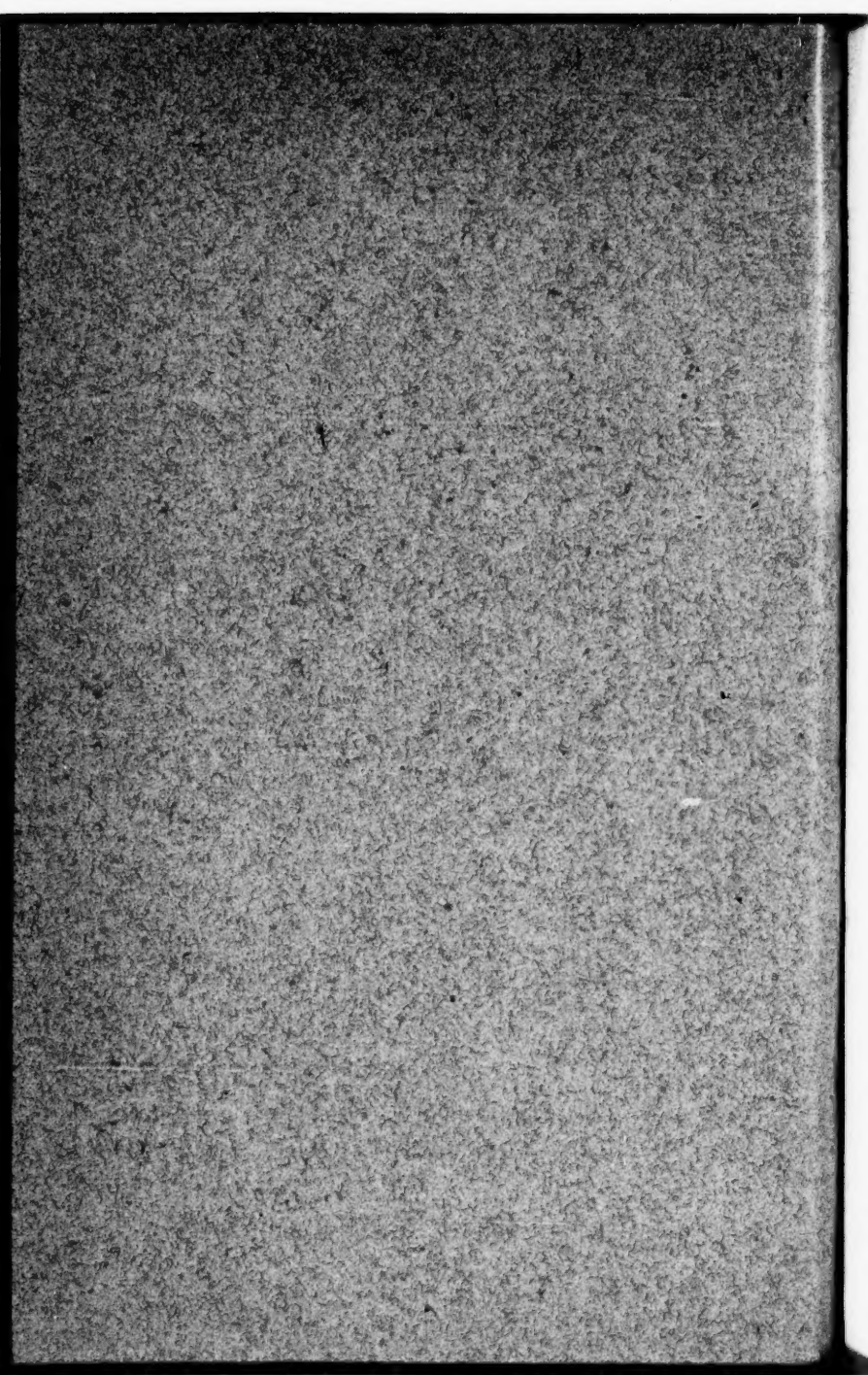
Respondent-Appellee.

Certiorari to the United States Circuit Court of Appeals
for the Second Circuit.

BRIEF FOR APPELLEE.

EVERETT P. WHEELER,

Of Counsel.



Supreme Court of the United States.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY
(Limited),
Respondent-Appellee.

Brief for Appellee.

Statement.

The libel alleges (p. 1) the delivery of twenty-six bales and three crates of duck uniforms to the Atlas S. S. Co. to be transported to Savanilla, and that libellant "received therefor three bills of lading, receipts and contracts, all of like tenor and date, whereof a copy is hereto annexed, marked A."

The bill of lading was put in evidence by libellant (p. 8, marginal page 14).

The steamer sailed July 19, 1893 (p. 23, marginal page 33). The goods were delivered between eleven and twelve o'clock of that day. They arrived too late to be put with the other Savanilla cargo. "It was just the last minute. * * * They were the last goods put in" (p. 25).

On the delivery of the goods a receipt for them was given "subject to the conditions expressed in the company's form of bill of lading" (Ex. 3, p. 30). Libellant received the bills of lading "not later than one o'clock,

and forwarded them by the same steamer" (p. 24, marginal page 34).

Libellant had shipped goods, at least, ten times on similar bills of lading (p. 14).

The Atlas steamers had been running on the same route to Carthagena and Savanilla, and on the same schedule for about three years (p. 13, marginal page 21). The usual course of that route was "first to Kingston, then to Savanilla, then to Carthagena and Port Limon, and then back to New York direct" (pp. 13, 14; p. 9). On that route the steamers carry cargo, passengers, specie and mails (p. 14).

The mistake in not delivering the bales of uniforms at Savanilla was not discovered until after the steamer had left that port, and about an hour before the discharge of Carthagena cargo (p. 16, fol. 62; p. 18, fol. 71 and 72; p. 19, fol. 74). The cause of the mistake was that the cases had been "stowed amongst the Carthagena cargo" (pp. 9, 10, 11).

The bales could not be landed at Carthagena because the law there does not allow the landing of cargo not on the manifests, and it was impracticable to forward the goods from there (p. 10). The steamer could not return to Savanilla, because she was "timed to be at Limon at a certain day to take up a perishable cargo that was waiting" (p. 10, marginal page 17).

The steamers have regular sailing days from these different ports. The return cargo at that season from Port Limon is bananas, and punctuality in sailing on the schedule time is, therefore, essential (p. 17).

POINTS.

First.

The question which appellant argues in this case cannot

be raised upon the record. He introduced no evidence tending to show that the goods in question were worth more than one hundred dollars per package, which is the amount of the recovery. The record, especially the opinion of the District Judge (pp. 31 to 35), shows that the respondent in the District Court contested the claim altogether. It was argued there, on the authority of

Railroad Co. *vs.* Reeves, 10 Wall, 176

and other cases cited by the District Judge (p. 34) that inasmuch as the proximate cause of the loss of the goods was a hurricane, which was obviously a peril of the sea; the plaintiff was not entitled to recover, although remotely the failure to land the goods at Savanilla occasioned the loss. This contention was overruled by the District Judge, who made a decree in favor of the libellant for \$2,900.

No new evidence was introduced in the Circuit Court. This Court has recently held, in the case of

The *Majestic*, 166 U. S., 375,

that the Circuit Court of Appeals was right in refusing to allow additional evidence to be taken in that case. The Court will remember that it appeared distinctly on the record that the practice in the Second Circuit had been changed in this respect just prior to the year 1892, and that unless in very exceptional cases, no new testimony would be allowed in that Court. An inspection of the record in *The Majestic*, which was returned on the certiorari for diminution of record (pp. 2 to 13) will show how strong a case was made for the introduction of additional testimony. Yet this Court approved the action of the Circuit Court in refusing it. How much more must this rule be applied in a case like the present, in which no application whatever was made for leave to take additional

testimony. The decree must necessarily be confined to the facts put in evidence in the District Court.

If, however, the Court should for any reason infer that the goods in question were worth more than \$2,900, we submit the following in support of the decree of the Circuit Court of Appeals:

Second.

Bill of Lading, a Contract.

The bill of lading delivered by the respondent to the libellant, which is alleged in the libel (p. 1), and of which a copy is annexed thereto (pp. 3 to 7), and which was put in evidence by him (p. 8, marg. page 14), constituted a contract between the parties, and is the sole evidence thereof.

The *Delaware*, 14 Wall., 579.

In that case it was held that parol evidence was not admissible to contradict the bill of lading. This was a clean bill of lading, containing no permission to carry goods on deck, and evidence of an oral agreement that the goods might be carried on deck was rejected. At page 601 the Court say:

“ Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge the payment or delivery, it, the receipt, is merely *prima facie* evidence of the fact, and not conclusive, and therefore the fact that it recites may be contra-

dicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between carrier and shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts."

As this Court said in the *The Caledonia*, 157 U. S., 124, 139 :

"We agree with the Circuit Court that the bill of lading can alone be considered as the contract between the parties, the memorandum being preliminary merely."

S. P. Bedell *vs.* Richmond & Danville R. R.,
94 Geo., 22.

The same rule is applied to inland bills of lading.

Garden Grove Bank *vs.* Humeston, &c., Ry.
Co., 67 Iowa, 526.

Hill *vs.* Syracuse B. & N. Y. R. R., 73 N. Y.,
351.

Germania Fire Ins. Co. *vs.* Memphis & Char-
leston R. R., 72 N. Y., 90.

This bill of lading is one of the best known of commercial instruments.

It has become quasi negotiable.

Conard *vs.* Ins. Co., 1 Peters, 386, 445.

Pollard *vs.* Reardon, 21 U. S. App., 639 ; 13
C. C. A. 171 ; 65 Fed. Rep., 848.

It is one of the most common securities upon which money is raised. It may be said without contradiction that half the grain and cotton crops of the United States are marketed by means of money borrowed upon security of bills of lading. An instance of this is the case last cited. The Court say (p. 533):

“An assignment of a bill of lading operates as a transfer of a title to the property therein described. As is said in *Meyerstein vs. Barber*, L. R., 2 C. P., 45: ‘While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading represents them; and this indorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship’s arrival would do.’”

This practice is mentioned as long ago as 1821, in *Faith vs. East India Co.*, 4 B. & Ald., 630, 632, 633.

In *Friedlander vs. Texas & Pacific R. R. Co.*, 130 U. S., 416, this Court uses the following language respecting the bill of lading:

“It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances, but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.”

An instrument possessing such properties is certainly a distinct advantage to the recipient. This is recognized by the Harter Act, which in express terms (Section 4) makes it the “duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between the ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading.”

Act Feby. 13, 1893, 27 U. S. Stat., 445.

Third.

Validity Clause of Limitation.

1. It is well settled that a clause in a bill of lading, limiting the amount of the recovery to a specified sum per package, is valid.

Hart *vs.* Pennsylvania R. R., 112 U. S., 331.

At page 340, the Court say :

“ There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take, at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss ; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.”

In that case there was no definite valuation of the horses in question. The clause in controversy read :

“ The carrier assumes a liability on the stock to the extent of the following agreed valuation :

“ If horses or mules, not exceeding \$200 each.”

This could not be called a valuation of a particular horse. It fixed nothing but the limit of liability. The carrier could have proved that the animal was worth less than the amount stated.

At page 340 of the Hart case, the Court continue :

“ The limitation as to value has no tendency to exempt

Kidd *vs.* Greenwich Ins. Co., 35 Fed. Rep., 351.

The Bermuda, 29 Fed. Rep., 399; *aff'g* S. C., 27 *Ibid.*, 476.

The Denmark, 27 *Ibid.*, 141.

Green *vs.* Boston & Lowell R. R., 128 Mass., 221.

Duntley *vs.* Boston & Me. R. R., 66 N. H., 263.

Brehme *vs.* Adams Ex. Co., 25 Md., 328.

Richmond & Danville R. R. *vs.* Payne 86 Va., 481.

Louisville & Nashville R. R. *vs.* Sherrod, 84 Ala., 178.

Railway Co. *vs.* Weakly, 50 Ark., 397.

Zouch *vs.* Ches. & Ohio R. R., 36 W. Va., 524.

The validity of a similar and much more onerous clause in a telegraph blank was sustained in *Primrose vs. Penn. R. R.*, 154 U. S., 1. At p. 15 the Hart case is quoted and approved.

The validity of a similar limitation in contracts for the carriage of passengers and their baggage is equally well settled.

Railroad Co. *vs.* Fraloff, 100 U. S., 24, 27.

There is no distinction on principle between these cases and the one at bar. They all rest on the solid foundation of allowing parties to define the limit of an undefined liability. Market value is always an uncertain quantity. The place of ascertainment is often in doubt, and it must always rest on evidence as to quality, which the shipper alone can give; and which ordinarily the carrier cannot refute.

In *Alair vs. Northern Pacific R. Co.*, 53 Minn., 160, the Court say (pp. 166, 167):

“ So far as the question now under consideration is concerned, we see no difference between a case like the present, where the stipulation is that the value of the property does not *exceed* a specified sum, and one where the value is stipulated *to be* a specified sum ; also that it makes no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier, without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet, and on which they act. Also, if the purpose of the stipulation is a lawful and proper one, the mere fact that it may incidentally have the effect of limiting the amount of the carrier's liability in case of loss caused by negligence, will not render it invalid. * * * Assuming, as we must, that the contract was fairly made for the purposes expressed in it, we think it ought to be upheld as just and reasonable. It is not in any proper sense a contract for exemption from the consequences of negligence.”

S. P. Douglas Co. *vs.* Minnesota Transfer Co.,
62 Minn., 288.

3. The amount of the limitation—one hundred dollars per package—is certainly reasonable, especially in view of the low charge of one dollar and thirty-four cents for transporting that package four thousand miles.

4. Similar clauses are held by the House of Lords to be just and reasonable, under the Railway & Canal Traffic Act, 1854.

Great Western R. Co. *vs.* McCarthy, 12 App.
Ca., 218.

Railway Co. *vs.* Brown, 8 *Id.*, 703.

The language of Lord Fitz Gerald in the latter case (p. 722) is applicable to this.

“ Why should the plaintiff be relieved from the contract

he has deliberately accepted? There was full and ample consideration, there is an absence of any fraud, and he has not been overreached. He elected to send his goods at the lower rate—the alternative offered to him was fair, and I can discover no ground on which we can treat this contract as a fraud upon the statute or relieve the plaintiff from its consequences.”

Fourth.

Incorporation of Indorsement.

It is equally well settled that the clauses printed on the back of the bill of lading in this case form a part of it, because they are, by express language, incorporated in it and are signed by the agents for respondent. The question is not of mere indorsement but incorporation by reference.

Record, p. 3 (Marg. p. 5); p. 6 (Marg. p. 9);
Clauses, 1, 9.

1. It is not to be supposed that the Courts intend to apply to carrier's contracts any different rule from that applicable to other contracts, so far as the question of what is to be treated as part of the contract is concerned.

If the carrier delivers to the shipper an instrument which is evidently intended as a whole, and which is obviously not a mere receipt, but is intended to embody a statement of the entire terms of the contract, it seems irrelevant to the inquiry as to what the contract is, whether a particular clause is printed on the back or on the face, or whether there are two pages or only one. The question is—Was the indorsement referred to in the body of the contract, and incorporated therein, by such reference?

The libellant cites expressions of Mr. Justice Davis in *Railroad Co. vs. Manufacturing Co.*, 16 Wall., 318, to the effect that certain indorsements upon a carrier's receipt were not to be regarded. In that case the character of the instrument delivered by the carrier to the shipper was essentially different from that in this. It was a mere receipt, and not a contract. It was expressed to be "subject to the rules and regulations established by the company, a part of which notice is given on the back hereof." There was nothing in this to indicate that the matter printed upon the back was any more than a regulation as to the manner of doing business. Judge Davis draws special attention to the fact that it was not signed by the carrier, and calls it a mere notice.

It did not appear that the shipper had ever shipped goods under a similar receipt, nor is there anything to show whether any question on this subject was submitted to the jury.

The receipt had no characteristic of a bill of lading. On the contrary it contained the following words: "This receipt is not transferable."

In short, the case is placed by the Court wholly on the ground that the receipt was not a contract and that the carrier could not altogether exclude his liability by a notice. In both essential particulars it differs from the case at bar. That decision must be compared with

Myrick vs. Michigan Central R. R. Co., 107 U. S., 102.

In that case the paper delivered to the shipper was a mere receipt for cattle "for transportation by the Michigan Central Railroad Company, to the warehouse at . . ." On the margin was the following:

"This receipt can be exchanged for through bill of lading.

NOTICE.—See rules of transportation on the back hereof.”

On the back of the receipt the rules were printed, one of which (the 11th) contained a stipulation :

“The company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the company.”

At page 108 the Court say :

“Though this rule brought to knowledge of the shipper might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.”

The decision was followed and approved in

North Penn. R. R. *vs.* Commercial Bank, 123 U. S., 727.

2. The decision of this Court in the case of *The Majestic*, 166 U. S. 375, must control this. In that case the Court decided that a notice printed on the back of a passenger ticket was not binding upon the passenger, because his attention was not called to it, and it formed no part of the contract. The Court say, p. 381 :

“By the contract in this case the Steamship Company agreed to land libellants with their luggage at the port of New York, and none of the alleged exceptions or conditions were referred to therein. They were notices and nothing more, and it cannot be held as matter of law that whether they were regulations for the conduct of business or limitations upon common law obligations, they constituted any part of the contract.”

The Court quote with approval (p. 384) the following passage from Wheeler on the Modern Law of Carriers, 263 :

"A notice or memorandum, even though printed upon the bill of lading or other contract of the carrier, *unless referred to in the body of the contract*, and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and the carrier."

At page 385 the Court add :

"On the evidence we are unable to conclude that the libellants should be held bound, as matter of fact, by any of the alleged conditions or limitations. They were not included in the contract proper in terms *or by reference*."

In the case at bar the bill of lading on its face, by express terms, incorporates the conditions printed on the back. These were simply printed there so as to enable them to be printed in larger type, and to prevent the bill of lading itself from becoming too cumbersome. The following is the clause upon the face of the bill of lading. (Record, p. 3):

"In accepting this bill of lading the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions as written on the back hereof, whether or printed, as fully as if they were all signed by such shipper, consignee, owner or holder."

It contains on its face no specification of exemption of any kind. Libellant testifies that he surrendered the shipping receipts and accepted the bill of lading in exchange (p. 24). The form of these shipping receipts is printed on page 30. Both of them acknowledge the receipt of the uniforms in question "subject to the conditions expressed in the company's form of bill of lading."

3. The bill of lading was issued after goods were shipped, but the shipping receipt expressed that the goods were received on the terms stated in the bill of lading.

This of itself was sufficient to constitute a contract to carry on these terms.

Wilde *vs.* Merchants' Desp. Trans. Co., 47
Iowa, 272.

The practice of giving a shipping receipt with the understanding that it is to be exchanged for a bill of lading is of long standing.

Craven *vs.* Ryder, 6 Taunt, 433.
Thompson *vs.* Traill, 2 C. & P., 334.

But this question does not arise in the case at bar.

No issue is made by the pleadings on the acceptance of the bill of lading. It is alleged in the libel and was proved by the libellant. The contention in his brief, that there was no express evidence of his assent, is, therefore unwarranted by the pleadings, and cannot be made here. In this respect it resembles the Hart case, 112 U. S. 331, 343.

4. Libellant cites expressions in the opinion in *Ayers vs. Western R. R.*, to the effect that "an explicit agreement" on the part of the shipper must be proved. This decision is not controlling here.

(a.) This case was decided solely on the authority of *Railroad Company vs. Manufacturing Co.* That decision has since been limited as before shown, and never applied to limitations of amount.

(b.) The admission in the libel and the statement in the shipping receipt that the goods were received subject to the conditions in the bill of lading, distinguish that case from the one at the bar.

(c.) The more recent case of *Quimby vs. Boston & Maine*

R. Co., 150 Mass., 365, holds that a reference in the body of a pass to conditions indorsed, incorporates them.

S. P. Collins *vs.* Bristol & Exeter R. Co., 11 Excheq., 790.

J. J. Douglass Co. *vs.* Minn. Transfer Co., 62 Minn., 288 ; S. C. 30 L. R. A., 860.

The Henry B. Hyde, 82 Fed. Rep., 681.

5. It is well-settled law that an instrument which on its face makes an express reference to another, incorporates that other as fully as if it had been embodied in the first.

This is only an application of the maxim "*Certum est quod certum reddi potest.*"

Broom Legal Maxims, 580 (6 Eng. Ed.) 625 (8 Am. Ed.).

In Bayne *vs.* Wiggins, 139 U. S., 210, this Court say (p. 215):

"This letter of the defendant's agent, read in connection with the other writings which had passed between the parties, unequivocally refers to the first deed, which fully described the land sold, and to the money and notes to be given in payment therefor, as specified in the letter which inclosed that deed. In the light of the undisputed facts its language could apply to nothing else. It thus, by necessary reference, embodies a definite statement of the contract actually made by the parties, both as to the property to be conveyed, and as to the terms of payment, and, taken together with that deed and that letter, constitutes a sufficient memorandum, signed by both parties on their agents, to take the case out of the Statute of Frauds."

To the same effect are :

Beckwith *vs.* Talbot, 95 U. S., 289.

Ridgway *vs.* Wharton, 6 H. L. Cas., 238.

Owen *vs.* Thomas, 3 Mylne & K., 353.
 Freeland *vs.* Ritz, 154 Mass., 257.
 Raubitschek *vs.* Blank, 80 N. Y., 478.

The terms of a bill of lading are incorporated in a contract indorsed on it and signed by parties.

Putnam *vs.* Wood, 3 Mass., 481, 485.

And where verbal contract of insurance is made it incorporates (by implication of law) the terms usual in such insurance.

Salisbury *vs.* Hekla Fire Ins. Co., 32 Minn., 458.

6. In *Primrose vs. Western Union Tel. Co.*, 154 U. S., 1, this Court held that the following language was sufficient to incorporate as part of the contract between the sender of a telegram and the telegraph company the clauses printed on the back of the telegraph blank.

On the face was the following language :

"Send the following message, subject to the terms on back hereof, which are hereby agreed to."

The printed sentence was not signed by the sender. It is true that the message below was signed, but this was not the clause which incorporated the terms endorsed. Below the signature of the sender of the message was the following :

"Read notice and agreement on back of this blank."

This Court held that the printed terms endorsed upon the blank were binding upon the sender and limited his right of recovery to the amount paid for transmission, \$1.15, although the actual damages were upwards of \$20,000.

In the case at bar the incorporation of the conditions printed on the back is far more obvious. They are twice referred to distinctly and specifically in the body of the bill of lading.

Fifth.**Acceptance by Shipper.**

It is well settled that the acceptance by the shipper of a bill of lading is conclusive evidence of his agreement to its terms.

York Co. vs. Central R. R., 3 Wall., 107.

In this case it was proved (p. 108) "that the cotton was shipped on the steamer before the bills of lading were signed; that the shipper had not examined the bills; that his attention was not called to the fire clause, and that his firm had no authority to ship for their principals with that exemption." It was also argued that there was no consideration for the exemption. But the Court overruled all the objections, and held that the plaintiff, who was the owner of the goods, was bound by the exemption in the bill of lading.

1. Evidence of express assent by the shipper to the terms of the bill of lading is unnecessary. In the case at bar, Calderon does not testify that he did not read it, or did not know its terms. But if he had so testified, he would equally be bound by the contract.

York Co. vs. Central R. R., 3 Wall., 107.

Kirkland vs. Dinsmore, 62 N. Y., 171.

Farnham vs. Camden & Amboy R. R., 55 Penn., 53.

Belger vs. Dinsmore, 51 N. Y., 166.

Grace vs. Adams, 100 Mass., 505.

In the latter case the Court say :

"It is not claimed that the shipper did not know that the receipt was a contract or a bill of lading. It was his duty to read it."

In

Snider *vs.* Adams Ex. Co., 63 Mo., 376,
the Court say :

“The instrument showed on its face that it was not merely a receipt. * * * It was his duty to read it.”

S. P. Mulligan *vs.* Illinois Central R. Co., 36
Iowa, 181.

The shipper is presumed to assent to its conditions, because he receives it under circumstances which, by the ordinary usages of business, would naturally lead him to infer that the document he receives, which is his muniment of title, quasi negotiable, and on the face of which he may borrow money, is a contract and not a mere receipt.

Cases before cited, and

Hoadley *vs.* Northern Trans. Co., 115 Mass.,
304.

Long *vs.* New York Central, R. R., 50 N. Y., 76.
Am. Ex. Co. *vs.* Second Natl. Bank, 69 Penn.,
394.

In Belger *vs.* Dinsmore, 51 N. Y., 166, reversing S. C., 51 Barb., 69, the Court held that the presumption of law was that a party receiving and accepting an instrument in any business (in this case an express company's receipt) is acquainted with its contents and assents to its terms.

Kirkland *vs.* Dinsmore, 62 N. Y., 171.

2. The case of Richardson *vs.* Rowntree, (1894): A. C., 217, cited in the opinion in the *Majestic*, is plainly distinguishable from the case at bar. In that case the jury found that plaintiff “did not know that the writing or printing contained conditions relating to the

terms of the contract of carriage." The House of Lords held that there was evidence sufficient to warrant this finding, and that the mere delivery of the ticket, which the person receiving it did not know to be a contract, would not bind a recipient by the terms printed upon the paper.

In the case at bar it cannot be claimed for a moment that the appellant did not know that the bill of lading delivered to him expressed the contract between him and the carrier. He alleges it in his libel, and annexes a copy of it thereto (p. 1).

Respondent proved that libellant had shipped goods under similar bills of lading several times, probably ten (p. 14). He was subsequently called and testified (p. 23), and does not deny that he had frequently shipped goods on similar bills of lading. This evidence, uncontradicted, is sufficient to require a finding of actual assent on his part.

Van Schaack *vs.* Northern Trans. Co., 3 Bissell, 394.

The decision of this Court in *Hart vs. Pennsylvania R. Co.*, 112 U. S., 3, 331, is in point. At page 343, the Court say :

"The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued."

Libellant gave no testimony tending to show that he did not fully understand the terms of the bill of lading, or that he was induced to accept it by any fraud or under any misapprehension. In this as in the *Hart* case, he

offered and read in evidence the bill of lading as evidence of the contract on which he sued.

3. A signature by libellant was unnecessary. In the Delaware and the other cases cited under the Second Point, the bill of lading was not signed by the person receiving it. It is matter of common knowledge that in the case of maritime bills of lading it has never been the practice for the shipper to sign the document delivered to him by the carrier.

Very careful research has failed to disclose a single instance in any reported case under maritime bills of lading, where the document has been signed by the shipper.

In *Quimbey vs. Boston & Maine R. R.*, 150 Mass. 365, it was held that the terms indorsed on a free pass, and incorporated by reference thereto on the face of the pass were binding on the passenger accepting the same, although he did not sign them, and although it was intended that he should. The Court say :

“Having accepted the pass he must have done so on the conditions fully expressed therein, whether he actually read them or not.”

The Judges of the Court below did not differ as to any of the questions which have thus far been discussed. Judge Wallace's dissent was wholly on the construction of a particular clause in the bill of lading.

Sixth.

Construction Bill of Lading as to Amount.

Appellant argues that the clause in question means that the carrier should not be liable *in any amount* for a package worth over \$100 “unless bills of lading are signed

therefor, with the value therein expressed, and a special agreement is made."

1. If the clause did mean this it would still be valid. This was expressly adjudged by Mr. Justice Blatchford, in the Second Circuit, on appeal, and has twice been held in the District Court for the Southern District.

The *Bermuda*, 29 Fed. Rep., 399; aff'g S. C.,
27 *Ibid*, 476.

The *Denmark*, 27 *Ibid*, 141.

2. But we cannot admit that the clause is open to the construction contended for. It provides that the "carrier shall not be liable for gold * * or for goods of any description, which are above the value of \$100 per package unless," etc.

If gold, which is exempted by name, were put in the same package with other articles, no one would claim that the others were exempt. The gold only would be excluded. So when goods making the value over \$100 are packed with goods of that value, the latter are not exempt. The former are.

Where goods are exempted by description, that description is exempt. When they are exempted by value, all over the value specified, are exempt. But how can it be said that the parties intended to exempt goods which were worth less than the specified value? The case is not one of a single article, but of numerous uniforms, packed in each bale or package.

The decree below charged the appellee with no liability for any goods in each package which were "above the value of \$100 per package."

3. If the clause is ambiguous, it should be construed *ut res magis valeat quam pereat*.

4. The clause referred to is, in effect, a valuation of the goods, as shown under the Seventh Point.

Seventh.

Construction of Bill of Lading as to Negligence.

The dissenting opinion of Judge WALLACE thus states the rule on this subject (p 40) :

“ General words exempting him (the carrier) from liability under particular circumstances, do not protect him from the consequences of his own negligence.”

1. The learned Judge states the rule correctly as applied to cases where the contract is to exempt the carrier altogether from liability. But the rule as laid down by him is not applicable to cases where the agreement is a diminution of the amount of liability, in accordance with the rate charged for transportation and not an entire exemption.

In *Hart vs. Pennsylvania R. R.* no mention was made in the bill of lading of a loss from negligence on the part of the carrier. The real reason for the rule on this subject is thus stated by this Court in that case (p. 337) :

“ It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. * * It is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation.”

The language of the bill of lading in the case at bar does not differ in any important respect from that in the *Hart*

case. The freight is \$39.43, or about \$1.34 per package. This is the sole consideration for the contract, which expressly provides that the goods shall be "subject throughout the entire transit, and while the goods are in the custody of the carrier, to the terms and conditions stated in this bill of lading."

Here, then, as in the Hart case, the presumption is conclusive that if the liability had been assumed on an unlimited valuation, as now urged, a higher rate of freight would have been charged. The word "value" is certainly as strong as the word "valuation." The bill of lading having provided that the particular twenty-nine packages shipped under it should be subject to the terms and conditions stated in the bill of lading, and one of these terms being that a special agreement is to be made "for goods of any description which are above the value of \$100 per package," and no such agreement having been made, nor any greater value therein expressed, it is manifest that the shipper, in effect, stated to the carrier that the goods in question did not exceed this value. By omitting to ask for a special agreement and by failing to make a special statement of value, he in effect asserted that the value was not over \$100.

To the same effect are

Graves *vs.* Lake Shore & M. S. R. R., 137
Mass., 33.

Ballou *vs.* Earle, 17 R. I., 441.

Richmond & Danville R. R. *vs.* Payne, 86
Va., 481.

Douglas Co. *vs.* Minn. Transfer Co., 62 Minn.,
288.

2. Judge Wallace cites *Magnin vs. Dinsmore*, 56 N. Y., 168, in support of the rule laid down by him. But he does not advert to the fact that on a subsequent appeal the

Court of Appeals distinctly held that this rule does not apply to a case like the present.

Magnin vs. Dinsmore, 62 N. Y., 35.

This was reiterated on the final appeal.

S. C., 70 N. Y., 410.

The case of *Westcott vs. Fargo*, 61 N. Y., 542, also cited by him, *holds* (p. 553) that the point which was afterwards raised on these latter appeals in *Magnin vs. Dinsmore*, was not raised on the trial of the *Westcott* case. This is in effect that when a carrier delivers a special acceptance, limited as to the amount of liability, it is a fraud in law if the shipper omit to state the actual value, and he cannot, therefore, recover for a value beyond the amount specified in the bill of lading.

3. The House of Lords, in construing a contract under the Railway and Canal Traffic Act of 1854, give to it the construction now contended for.

Railway Co. vs. Brown, 8 App. Ca., 703, 709.

Eighth,

Reformation of Contract.

If the bill of lading be a contract it is plain that it can be reformed by the Court only under the same circumstances as other contracts. What the libellant is really seeking to do in this case is to reform the bill of lading. If it bear the construction which has been contended for, as plainly it does, and if the clause containing this construction be lawful, as this Court held it was in the *Hart* case, the clause can only be stricken out of the

contract upon evidence "clear, unequivocal and decisive ;"
 "so clear and convincing as to leave no room for doubt."
 To use the language of this Court in

Howland *vs.* Blake, 97 U. S., 626,

"If the proofs are doubtful or unsatisfactory, if there is a failure to overcome the presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties."

To the same effect are

Baltzer *vs.* Railroad Co., 115 U. S., 645.

United States *vs.* Munroe, 5 Mason, 572.

Christopher and Tenth Street R. Co. *vs.*

Twenty-third Street R. Co., 145 N. Y., 51.

Ivinson *vs.* Hutton, 98 U. S., 79.

At p. 83 the Court say :

"Courts of equity possess the power to correct mistakes in written instruments even to the extent of changing the most material stipulations which they contain and which are the subjects of special agreement, but the settled rule of practice is that the power should always be exercised with great caution and only in cases where the proof is entirely satisfactory."

So far from there being such evidence in the case at bar, there is no evidence at all that the written contract does not express correctly the actual agreement.

Ninth,

Harter Act.

1. The Carriers' Act of February 13, 1893, known as the

Harter Act (27 Stat., 505), does not affect the validity of stipulations limiting the amount of recovery, or making it the duty of shippers to disclose the value or character of goods. The object of all such clauses is to compel fairness on the part of the shipper. The "Carrier's reward ought to be proportionable to the risk."

Gibbon *vs.* Paynton, 4 Burr, 2298; cited and approved,

Hart *vs.* Penn. R. R. Co., 112 U. S., 331, 341.

The amount of this reward is not touched by the Harter Act, and, therefore, the amount of the recovery is not.

That Act was passed in order to establish beyond controversy the validity of certain clauses in bills of lading, and the invalidity of others. On these points there was a distressing conflict of authority which is now ended. There is nothing in its language or its history which tends to show that it was intended to abrogate the reasonable limitation of the amount of liability, in proportion to the risk and the reward.

No complaint was made by shippers on this point. The actual grievances which led to the passage of the Harter Act are so fully stated in the brief in the *Carib Prince*, submitted herewith, that it is needless to repeat them. We do, however, draw special attention to the fact that the same Court which, in *Railroad Co. vs. Lockwood*, held a stipulation to be void which altogether exempted the carrier from liability for the negligence of his servants, in the Hart case sustained the validity of a limitation as to amount, although the loss in that case was caused by negligence. The distinction between the two classes of cases was well recognized before the introduction of the Harter Act.

"Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this

the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the legislative body."

Holy Trinity Church *vs.* United States, 143 U. S., 457, 463.

This is made even clearer by a comparison between the Act as it passed the House (24 Cong. Rec., Part 1, p. 147) and as it passed the Senate (*Ibid.*, Part 2, p. 1180). The first section, so far as it relates to this subject, originally read :

"Nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom."

It was amended to read :

"That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

The distinction between exemption from liability and a limitation thereof is clearly shown by this comparison. The bill originally prohibited both. As amended it prohibits the former and not the latter. The amendment could have no other object.

2. The Hart case, as above stated, shows the reasonableness of the position contended for. The more valuable the goods the more care has to be taken of them and the higher the rate of transportation has to be. The Courts

must recognize the rights of carriers to say that they will only take property of great value at a high rate of freight in order to compensate them for the heavy liability which they assume if the goods are lost. Carriers are influenced by exactly the same facts which determine the rate of premiums in insurance policies. If they are insurers they are entitled to an adequate premium. The question is what is the amount insured and what the risk? When these are known the rate follows. When a loss occurs the insured can only collect the amount for which his policy was issued, no matter what the lost property was worth. The insurance company pays only the risk which it assumed—no more. The present case is exactly analogous.

The Atlas SS. Company represented, by its bill of lading, that it was willing to accept any goods of a value up to \$100, and make itself responsible for the careful transportation of them for a *fixed rate*. If the shipper wanted the company to be liable for more than \$100, it was his business to state the value at the higher figure and pay accordingly for the risk assumed. He did not see fit to do so, however, but paid freight upon a basis of valuation of \$100. When a loss occurs he attempts to say that the property was worth more than the value fixed. The company has a right to reply with the insurance company, "You can only collect the amount of the risk which you paid us to assume."

The practice of regulating the amount of care to be bestowed upon property by its value, and by the consequent price paid for the extra care, is illustrated in all branches of business.

If a man wants to express diamonds he must state their value and pay accordingly. The express company then has notice of the value of the package, is paid in proportion to the risk which it assumes, and puts the package in its safe.

If a man wants to store merchandise in safety he pays for so much space in a warehouse ; if he wants to put securities in a secure place he pays a good price for a tin box, perhaps two feet long and six inches wide, in a safe deposit vault. In both cases the property is in the hands of a bailee. The difference in the price charged is regulated entirely by the increased care which one bailee agrees to take of the property deposited. That involves greater cost to the bailee, for which the bailor must pay.

The United States government acts upon the same principle in handling the mail. If a man wants his letter to go by the fast mail he must put first class postage upon it. No matter what the urgency, if the letter is sent as third class matter, wrapped up in a newspaper, it receives third class treatment ; is delayed in favor of first class mail, and if the address becomes erased it never goes to the dead letter office but is thrown away. If on the other hand a man wants greater speed or security than even first class matter ordinarily receives, he must put a special delivery stamp upon his letter or register it.

The Harter act says that no carrier may not enforce an agreement whereby he shall be "relieved" from liability. But it is quite another thing to say that he is liable to the utmost for all property lost, regardless of its declared value or the price paid for its transportation. That is like transforming the warehouseman into a safe deposit company and still insisting upon warehouse prices.

3. The argument for libellant upon the language of the Harter act, if pressed to its logical conclusion, would require the Court to hold that any valuation placed by the terms of a bill of lading upon the goods shipped would be illegal. For in one sense that valuation, if valid, "relieves" the carrier from liability for any loss

above the amount of the valuation. Why strain the term "relieve," so as to prohibit a reasonable contract, which has been recognized as such throughout the evolution of the law of carriers: when by giving to this word "relieve" a reasonable construction it will remedy the evil which caused the passage of the Act, and do justice to both shipper and carrier.

4. The Court, in construing a statute will consider other acts which are *in pari materia*.

1 Kent Comm., 463.

The Interstate Commerce Law should therefore be considered in this connection. Section 1 enacts that all charges made for any transportation rendered by the carriers to whom the act applies, some of whom are ocean carriers, "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Section 2 provides

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, deed or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in transportation of the like amount of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The only possible result of the construction under consideration would be to force upon the carrier the necessity of a much higher rate than that now charged for low-class goods, in order that as a whole his rates charged should

be sufficient to compensate him for the liability assumed. Congress certainly could not compel him to carry goods for nothing, and if he cannot by special contract charge a stated sum per ton for goods of the value of one hundred dollars per package, and limit his liability to that amount in case of loss, unless a greater value be declared, and a higher rate of freight paid, he would be forced to make a fixed rate for all goods whatsoever, which would be too high for the cheapest goods carried, as it would also be too low for the most valuable goods. This would be an unfair discrimination in favor of the latter. Such discrimination Congress has uniformly endeavored to prevent.

5. The rule which should guide the Court in the construction of this act is well stated by Chancellor KENT,

1 Kent Comm., 462 :

“The reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity.”

This rule has often been applied by this Court.

Oates vs. United States, 100 U. S., 239.

Rector Holy Trinity Church vs. United States,
143 U. S., 457.

United States vs. Laws, 163 U. S., 258.

In re Chapman, 166 U. S., 661.

In the latter case at p. 667 the Court say :

“Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or an absurd conclusion.”

To the same effect are

People vs. Lacombe, 99 N. Y., 44.

Railton vs. Wood, L. R. 15 App. Ca., 363
(P. C.).

Attorney-General vs. Horner, 14 Q. B. Div.,
245, 257.

6. For a like reason it is well settled that the Court will always, if possible, adopt that construction of an act which will render it constitutional. The implication must always exist that no violation of the Constitution has been intended by Congress, and that implication will at times even require the Court to lean to the construction which possibly would not seem most obvious and natural, in order that the statute may have effect. It is always to be presumed that Congress did not intend any clause of the act to be a nullity. The construction contended for here by respondent is more obvious and natural than that urged by the appellant. But even if that were not so, the above principles would require the Court to avoid any construction by which any portion of the act should be rendered a nullity.

Sedgwick on Stat. Const. (2 Ed.), 266.

Roosevelt vs. Goddard, 52 Barb., 533, 545.

Colwell vs. May's Landing W. P. Co., 19
N. J. Eq. (4 C. E. Gr.), 245.

Duncombe vs. Prindle, 12 Iowa, 1.

People vs. San Francisco, &c., R. R. Co., 35
Cal., 606.

Bigelow vs. W. Wis. R. R., 27 Wis., 478, 486.

A notable instance of the application of this rule of construction is to be found in

People vs. Cannon, 139 N. Y., 32.

There, in answer to the objection that the act in question (the Bottling Act) deprived the owners of bottles of property without due process of law, the Court construed the statute in opposition to its literal language, but so as to give effect to its general purpose, without infringing upon individual rights.

Tenth.

Congress has no power to prohibit parties from contracting that reward shall be proportionate to risk.

The first section of the Harter Act which makes it unlawful to insert in a bill of lading a clause which altogether exempts a carrier from liability for his negligence is based upon the policy of the common law, as it existed before the Constitution of the United States was adopted, and as it has been expounded by this Court. Some other Courts, it is true, had taken a different view of this policy, and had sustained the validity of contracts exempting carriers from liability for negligence. It was to prevent this conflict for the future and to put all vessels trading to our ports on a footing of equality in this respect that the Harter Act was passed.

But a construction of the first and second sections of that act which would prohibit parties from contracting that the reward shall be proportionate to the risk, rests upon no public policy whatever. No reason can even be suggested why a carrier by sea should be forced to accept any goods offered by a shipper, without a right to require from him a statement as to the value of the goods, and an equal right to charge in proportion to the value so declared.

The same principle which allows such a transaction

between the shipper and the carrier would also allow the carrier to notify all shippers that for goods up to the value of one hundred dollars a specific charge would be made, and that where the value of goods so shipped is not declared to be above one hundred dollars a package, as would usually be the case, such failure to declare the value would be taken as an admission that the goods were not of a greater value, and would leave the shipper the right to prove damage in case of loss up to that amount. The carrier cannot compel the shipper to declare the value, and is entitled to place upon him the risk of loss if he fails to make such declaration, and to pay a proportionate rate.

If any clause in either section of the act can be construed as prohibiting such a contract, the clause to that extent is unconstitutional,

I.—On the ground of unjust discrimination, and that of the worst sort, in favor of the owner of valuable goods and against the owner of goods of less value.

Since our American written Constitutions were first construed by Courts it has always been recognized that neither Congress nor the Legislature of a State has the right to make an arbitrary designation of any class of persons which is to be affected by its legislation, whether such legislation be within the scope of the police power or otherwise.

In State *ex rel.* McCue *vs.* Sheriff of Ramsey Co., Minn., 51 North West Rep., 112, a statute prohibited the emission of dense smoke except from certain manufacturing establishments. The Court held the act unconstitutional for discrimination, saying:

“No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the

nuisance occasioned by dense smoke, but it can make no practical difference in what business the owners or occupants, or the buildings in which such smoke is produced, are engaged."

Granting that the Legislature has the right to prohibit the emission of smoke, it is the smoke against which the act must be aimed, and not against certain individuals, while it exempts other persons whose smoke is equally dense.

In *State vs. Loomis*, 115 Mo., 307, a statute of the State made it unlawful for any corporation, person or firm engaged in manufacturing or mining, to issue any order, check or other token of indebtedness payable otherwise than in money, unless it was redeemable at its face value in cash or goods, at the option of the holder. This Act was held unconstitutional as class legislation. The Court said :

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that the differences which would serve for classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon statute or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land. * * They (these sections) undertake to deny to the persons engaged in the two designated pursuits, the right to make and enforce the most ordinary every-day contracts, a right granted to all other persons. This denial of the right to contract is based on a classification, which is purely arbitrary, because the ground of classification has no relation whatever to the natural capacity of the persons to contract."

The language above quoted is very apt. This section of the Harter Act, upon the construction contended for, can only be supported, if there is some reason why the owner of goods of small value should be compelled to pay as much for their carriage as the owner of goods of greater value.

In *Ritchie vs. The People*, 155 Ill., 98, the Court say at page 106 :

“Where legislative enactments which operated upon classes of individuals only have been held to be valid, it has been where the classification was reasonable and not arbitrary.”

A statute was there held to be unconstitutional for discrimination which prohibited the employment of females in any factory or workshop for more than eight hours a day. The Court held that there was no reason for discriminating between employers in factories or work shops, and merchants or builders or carriers.

In *Low vs. Rees Printing Co.*, 41 Nebraska, 127, the Court was construing a statute providing that for all classes of mechanics, servants and laborers, except those engaged in farming or domestic labor, a day's work should not exceed eight hours, and that extra pay must be rendered for all work over that time. The Court held that the statute was unconstitutional on account of its discrimination against farm and domestic laborers, which made it special legislation.

In *Frerer vs. The People*, 141 Ill., 171, the statute provides that wages should be paid only in money, and prohibited persons engaged in mining and manufacturing from keeping “truck stores.” The Act was held unconstitutional on account of this discrimination. The Court said (p. 178) :

“There is nothing in operating mines and manufactures

to render the individuals employed therein less capable to contract or to give the employer greater wisdom and adroitness therein, than if they were engaged in operating and controlling respectively some other branch of industry."

The same principle is re-stated in *Ramsey vs. The People*, 142 Ill., 380.

In *Millet vs. The People*, 117 Ill., 294, a statute which provided that all coal which was mined should be weighed and a record of the weights kept for the inspection of operators and the public, was held unconstitutional. The Court said (page 302):

"What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of labor, or in regard to the mode of ascertaining the price, and why should the owner of the mine or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?"

It is not necessary to maintain that in each of the cases thus cited, the Court correctly applied the rule for which we contend. The rule itself is what we invoke. It is well stated in

Cooley on Const., Lim., 6th Ed., 484:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities, in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts or to receive conveyances, or to build

such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

The reasoning which this Court adopted in the cases of *Munn vs. Illinois*, 94 U. S., 113, and *Budd vs. New York*, (143 U. S., 517) is in no way applicable to the present case. In those cases statutes were upheld which made a fixed charge for certain fixed services: so much for elevating grain per bushel. The service and its cost for each bushel were identical.

In the case of carriage by sea the service and its cost for goods of largely different character and value are essentially different, and Congress has no power to discriminate as it would do by the requirement that the charge for the less costly service should be as much as that for the more costly service.

Moreover, in the *Budd* case (p. 547) the Court expressly said that the power to regulate charges could not be exercised "to compel the doing of the services without reward." Now, if the reward for carrying goods worth \$100 is adequate, and no more, it is obvious that an act which would compel the carrier to carry goods worth \$1,000, for the same reward, would in effect compel him to carry the value of \$900, without reward. This, Congress has no power to do.

*Covington & Lexington Turnpike Co. vs.
Sandford*, 164 U. S., 578.

II.—The construction contended for would also be unconstitutional as violating the provisions of the fifth amendment of the United States Constitution, in that it would deprive carriers by sea of liberty and property without due process of law. The right to contract in matters which may lawfully form the subject matter of a contract, is both a liberty and a property right, which cannot be denied a man without due process of law.

Commonwealth *vs.* Perry, 155 Mass., 117.

In this case a statute was held unconstitutional, which prohibited employers from contracting with their workmen that a portion of their wages might be deducted on account of imperfect workmanship. At p. 121, the Court say :

“The right to acquire, possess and protect property, includes the right to make reasonable contracts which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right, which are expressly recognized in our Constitution.”

This case is strictly analogous to that at bar. The right to contract that a higher price shall be payable for good work than for bad, is of the same character as the right to contract that a higher price shall be paid for a costly and difficult service than for that which is cheap and easy.

The dissenting opinion of HOLMES, J., in effect, takes

the ground that the workmen might be considered as weak and needing protection, and "that the Legislature had the right to deprive the employers of an honest tool, which they were using for a dishonest purpose."

There can be no pretense of this sort in the case at bar, and it would seem that if a statute bearing the construction now contended for had been before the Supreme Judicial Court of Massachusetts, Mr. Justice HOLMES would have concurred with his brethren in holding it unconstitutional.

The Slaughter Houses cases, 16 Wall., 36, 80, 81, cited by Mr. Justice HOLMES, *held* that the Statute of Louisiana, there under consideration, was a valid exercise of the police power. The business of slaughtering cattle as conducted in 1869, was often dangerous to life and health. The decision of this Court that it could properly be regulated has justified itself. And here let us say, once for all, that we are not called upon to maintain that in each of the cases about to be cited the Court correctly applied the constitutional rule we now invoke. The weak, ignorant and improvident have always been entitled to special consideration in Courts of equity, and Legislatures may constitutionally pass laws reasonably adapted to protect them. But they cannot, under color of this, restrict freedom of contract in cases which do not come within the police power or within the branch of equity jurisdiction just referred to.

The libellant cannot claim special legislation on either ground.

The distinction just stated between valid and invalid legislation, so far as it is affected by the clause of the Constitution now under consideration, is clearly defined in

People *vs.* Ewer, 141 N. Y., 129.

The following cases are illustrations of the application

by various Courts of constitutional provisions similar to that under consideration :

In *Ritchie vs. The People*, 155 Ill., 98, before cited, the Courts say, at page 104 :

The privilege of contracting is both a liberty and property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts * * * (page 105). "The right to contract is the only way by which a person can rightfully acquire property by his own labor. Of all the rights of persons it is the most essential to human happiness," Quoting *Leep vs. St. L., &c., Ry. Co.*, 58 Ark., 407.

Ex parte Kuback, 85 Cal., 274.

In this case an ordinance of the city of Los Angeles, making it a misdemeanor for any contractor with the city to employ a person to work more than eight hours a day was held unconstitutional.

At p. 275, the Court say :

"It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation ; but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered, because the contract is that he shall work more than a limited number of hours per day."

In *Godcharles vs. Wigeman*, 113 Penn. State, 431, a Pennsylvania statute made void all orders payable in anything but money, given by employers engaged in manufacturing, to their workmen. The Court said of these provisions (p. 437) :

They "are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what in this country cannot be done, that is, prevent persons who are *sui juris*, from making their own contracts. The Act is an infringement alike of the right of the employer and the employee."

Almost the same language is used in *State vs. F. V. Coal & Coke Co.*, 33 W. Va., 188.

In *State vs. Goodwill*, 33 W. Va., 179, a statute was before the Court by which those engaged in mining and manufacturing were prohibited from issuing orders to employees unless payable in money. This Act was held unconstitutional. The Court say (p. 104):

"The right to use buy and sell property, and contract in respect thereto, including contracts for labor, which is as we have seen, property, is protected by the Constitution."

In *Ramsey vs. The People*, 142 Ill., 380, a statute provided that where miners were paid in proportion to the amount of coal mined, the coal must be weighed before being screened. The Act was held unconstitutional. The Court say (p. 386):

"In all other kinds of business involving the employment of labor, the employer and employee are left free to fix by contract the amount of wages paid and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interests of both parties. To the extent to which it is bridged, the property right is taken away."

This decision was followed in *Braceville Coal Co. vs. The People*, 147 Ill., 66.

The New York cases are to the same effect:

People vs. Gillson, 109 N. Y., 389.

People vs. Marx, 99 N. Y., 377.

In re Jacobs, 98 N. Y., 98.

Eleventh.

Deviation.

The appellant argues that the clause in question does not apply to the case at bar, because the loss occurred after the steamer left Savanilla. To this we reply :

1. The recovery is not for a loss incurred by deviation, but for negligence in not making more thorough search for the goods at Savanilla.

Clause 9, of the bill of lading, allows goods to be over-carried. It was inserted with reference to the usual course of business to which reference has been had.

The necessities of proper stowage and distribution of a mixed cargo, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call. The ship being under the necessity of delivering mails and passengers with punctuality and despatch, and of avoiding delays that would be destructive to cargoes of perishable fruit, cannot overhaul all its cargo at every port of call.

All carrier's contracts are made with reference to the usage of the trade as to stowage.

Baxter *vs.* Leland, 1 Abb. Adm., 348.

The *Colonel Ledyard*, 1 Sprague, 530.

Barber *vs.* Brace, 3 Conn., 9, 13.

This is admitted in

The *Delaware*, 14 Wall., 579, 598, 606.

Usage in reference to the manner of delivery is binding upon both parties.

Richmond *vs.* Union Steamboat Co., 87 N. Y., 240.

Homesly *vs.* Elias, 66 N. C., 330.

Adams Ex. Co. *vs.* Darnell, 31 Ind., 20.

Salter *vs.* Kirkbride, 4 N. J. Law. Rep., 223
229.

McMasters *vs.* Penn. R. R., 69 Penn., 374.

The *Tybee*, 1 Woods, 358.

Hooper *vs.* Chicago & N. W. R. Co., 27 Wis.,
81.

Whitehouse *vs.* Halstead, 90 Ill., 95.

It is also binding when it relates to the method of transportation.

Robertson *vs.* Nat. S. S. Co., 139 N. Y., 416.

In the case at bar, this usage explains clause 9, and shows that it was intended to allow just what happened here. The learned District Judge held that this clause did not constitute a defense because of the carrier's failure to prove diligence in searching for the goods at Savanilla. Assuming, for the argument, that this is a sufficient reply, it still proves that the recovery is because of the negligence and not because of the deviation.

2. The authorities cited as to recovery by the shipper, where there has been a deviation (with one exception, to be considered hereafter), do not touch the effect of clauses limiting the amount of recovery. They do not, on principle. The reason of the decisions on the latter clauses, stated under the Third and Ninth Points, are equally applicable to a loss from deviation. If the appellee had been notified of the actual value of these uniforms, it would have bestowed more care upon the search at Savanilla. All care involves expense, and for expense there should be a proportionate reward.

In *Douglas Co. vs. Minnesota Transfer Co.*, 62 Minn., 288, it was held that a clause of this sort was operative to reduce the recovery, although the goods were shipped by the wrong route.

3. The only case cited for libellant on this point is
Ellis vs. Turner, 8 Term Rep., 531.

To this there are several replies :

a. The English cases on carriers decided during the last century, have been so modified by the recent decisions that they cannot be cited as authority.

b. In that case there was an express agreement to deliver at the first port of call, and an express and wilful refusal to deliver there. On these two grounds the decision is based.

c. In that case there was no written contract, but only a posted notice, never seen by plaintiff.

4. The argument was much pressed in the Court below, that the effect of the deviation was to vitiate the insurance. This, however, would depend upon the form of the policy. If libellant had insured the goods "with all liberties as per bill of lading," the goods would have been covered notwithstanding the failure to deliver them at Savanilla. This is not an uncommon form of insurance. There are numerous routes in which it is of great importance to the carrier to permit what this bill of lading permits, and it is a very simple matter for the shipper to obtain insurance policies, covering such contingencies, as will under these circumstances occasionally arise.

Insurance is a collateral contract and cannot affect the carrier's liability to the shipper.

The City of Norwich, 118 U. S., 493.

Foley vs. Ins. Co., 152 N. Y., 131.

5. In the present case, especially, the limitation was reasonable. The ultimate cause of the loss was that the goods were offered for carriage, too late for proper stowage.

6. The argument on the subject of deviation would be

entitled to more effect if the Court below had held that the respondent was not liable because the proximate cause of the loss was a hurricane, which was, of course, a peril of the sea. The fact of a deviation may make the carrier liable, as the District Court held, but it has no tendency to determine the extent of the liability. There are many other causes which might make the carrier liable. He would be liable for negligence. This liability, however, as we have already shown, may be limited in its amount, and such limitation as to amount in the nature of the case must apply, whatever be the ground of the libel. In short, the argument for libellant fails entirely to discriminate between an exemption from and a limitation of liability. It is not competent, according to the rule of the Federal Courts, for a carrier to exempt himself from liability for negligence. It is competent for him to limit the amount of such liability. Surely the liability for negligence cannot, in the nature of the case, be less onerous than a liability for an unintentional deviation.

7. In examining the cases on this subject a broad distinction will be noticed.

In some of them there was a wilful wrong by the carrier's servants. In some there was an absolute abandonment by the carrier of the contract of carriage. It is held that in either case limitations of liability in the contract of carriage for injury from specified causes, such as storms or fire, do not apply. The case of *Ellis vs. Turner*, cited by appellant is an apt illustration. There was an express and positive agreement to deliver at Stockwith before undertaking the further voyage to Gainsborough. This was made for the express purpose of excluding what appeared to be a frequent practice of delivering on the return from Gainsborough.

In the case at bar, if the shipper had insisted upon striking out the ninth, tenth and eleventh clauses of the bill of

lading, and had demanded the goods at Savanilla, and the Master had there expressly refused to deliver them the cases would be parallel. On the contrary, here is neither,

a. A wilful wrong, nor *b*, an abandonment of the contract.

Assuming there was negligence in its performance (of which, however, there is no positive proof), there was still an endeavor to perform, and all possible diligence was used to rectify the mistake, immediately upon its discovery.

There are, doubtless, general statements in text books, and decided cases which tend to support libellant's theory. But in none of them was there an agreement like that in the present case. In view of the exigencies of the business this certainly was reasonable, and should be enforced.

The construction now contended for was put upon similar language in the English Carriers' Act of 1830. The distinction just stated was held to be well taken by the Court of Appeals affirming the Queens Bench Division.

Morritt vs. North Eastern R. Co., L. R., 12 Q. B. Div., 302.

Twelfth.

Evidence as to Negligence.

One fallacy in libellant's argument consists in the assumption that respondent owed a duty to him alone. In fact, however, it owed a duty to the government and the public to deliver the mails promptly, to passengers to land them punctually, and to all the other shippers to cause no unnecessary delay. It had not unlimited time within which to perform these duties. On the contrary

the *Ailsa* was running on schedule time, and was bound to adhere to this schedule as closely as possible.

The anchorage in Savanilla was a mile and a half from the landing, and cargo was landed in lighters. The harbor was a dangerous one (p. 16). Of all these facts the libellant, a regular shipper by this line, is chargeable with notice, and they qualify materially the respondent's obligation to the libellant, in reference to the time which the letter might require to be devoted in the roadstead at Savanilla to a search for his packages.

In short, negligence involves the idea of a violation of duty, and duty is measured by the existing circumstances. Under these circumstances the respondent is not chargeable with negligence, for not delaying at Savanilla to hunt up the libellant's packages.

On the other hand it is undisputed that libellant sent his goods on board just before sailing, when methodical stowage would necessarily be more difficult. This certainly contributed to the loss.

Wherever the shipper's negligence concurs with that of the carrier, and both contribute to the loss, the shipper cannot recover. Much more can he not recover, where, as in this case, there is no proof of respondent's negligence.

Erie R. Co. vs. Wilcox, 84 Ill., 239.

Hart vs. Chicago & N. W., 69 Iowa, 485.

Thomas vs. Ship Morning Glory 13 La. Ann., 269.

Northern vs. Williams 6 *Ibid.*, 578.

Thirteenth.

The decree of the Circuit Court of Appeals should be affirmed with costs.

EVERETT P. WHEELER,
Advocate for Respondent-Appellee.

Statement of the Case.

CALDERON v. ATLAS STEAMSHIP COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 88. Argued March 8, 9, 1898.— Decided April 25, 1898.

The appellant shipped, by a vessel belonging to the appellee, goods under a bill of lading which contained the following stipulation: "In accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder." Of these stipulations and conditions, this court regards only the following as material: "1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." "9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise." "14. This agreement is made with reference to, and subject to the provisions of the U. S. carriers' act, approved February 13, 1893." The goods were not delivered at the port to which they were consigned, and were subsequently lost at sea on another vessel belonging to the appellee, on which they had been placed without the appellant's knowledge. In a suit in admiralty to recover their value, *Held*,

- (1) That as the negligence of the company was clearly proven, there can be no doubt of its liability under the act of February 13, 1893, c. 105, known as the "Harter Act;"
- (2) That the clause limiting the amount of the carriers' liability is to be construed as a statement that the carrier shall not be liable to any amount for goods exceeding \$100 per package; and being so interpreted, that it is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of \$100 per package, and as such is not only prohibited by the Harter Act, but held to be invalid in a series of cases in this court.

THIS was a suit instituted in the District Court for the Southern District of New York, in admiralty, by the libel

Statement of the Case.

lant, Calderon, who was at that time consul general for the United States of Colombia at New York, to recover from the respondent, the Atlas Steamship Company, the sum of \$5413.18, the value of a consignment of goods shipped from New York to Savanilla by the libellant on the steamer Ailsa, which goods the master failed to deliver at the port of destination, and thereafter brought back to New York, where they were reshipped by the respondent on the steamer Alvo. The goods were lost by the sinking of this ship through a peril of the sea.

It seems the respondent owned both the Ailsa and the Alvo, and ran them between New York, Kingston, Savanilla, Carthagena and Port Limon, from which last-named port they sailed direct to New York, usually carrying a cargo of fruit. Libellant had frequently shipped goods by this line and over the same route, and on July 19, 1893, about two hours before the Ailsa sailed on its regular voyage from New York, delivered to the company on its pier, under authority of a special permit from the company, the consignment of goods in question, which consisted of twenty-six bales and three crates of duck government uniforms, for transportation to the port of Savanilla, and from thence to Baranquilla in the United States of Colombia. The receipt given by the company to the truckman who delivered the goods stated that they had been received "at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading."

The bill of lading, subsequently obtained in lieu of the receipt, and a copy of which was sent by mail to the consignee by the same steamer, contained on its face the provision: "And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were signed by such shipper, owner, consignee or holder."

Of the stipulations, exceptions and conditions printed on the back, only the following are material:

- "1. It is also mutually agreed that the carrier shall not be

Statement of the Case.

liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

"9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by the first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

"14. This agreement is made with reference to, and subject to the provisions of U. S. carriers' act, approved February 13, 1893."

It appeared from the testimony taken that these goods were the last to be loaded, and that instead of being stowed with other freight for Savanilla, the port of destination, they were placed in another hold of the ship and in the "last tier to come out" of the Carthagena freight. It also appeared that the consignment was not discharged at Savanilla, and that it was not discovered to be on board until the ship was well on its way to Carthagena. The ship, however, proceeded on its voyage without attempting to make the delivery of the goods, and upon receiving a cargo of fruit at Port Limon sailed for New York, where the consignment was reshipped, August 16, 1893, on the steamer *Alvo*. No notice was given to libellant of the return of the goods or of their reshipment. The *Alvo* was caught in a hurricane and lost at sea with her entire cargo.

The District Court held that there was a "failure in the proper delivery" of the goods at Savanilla, but that inasmuch as bills of lading were not signed specially designating the value of each of the twenty-nine packages, as provided by clause one on the back of the bill of lading, the liability of the company was limited to \$100 for each of the twenty-nine packages, or \$2900 in all. *Calderon v. Atlas Steamship Co.*, 64 Fed. Rep. 874.

From this decree the libellant alone appealed, and upon the

Opinion of the Court.

hearing the Circuit Court of Appeals for the Second Circuit, by a majority opinion, sustained the decree of the court below. 35 U. S. App. 587.

Mr. J. Langdon Ward for appellant.

Mr. Everett P. Wheeler for appellee.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

Two questions are presented by the record in this case: First, whether the steamship company was liable at all under its bill of lading for the non-delivery of the goods at Savanilla; second, whether such liability was limited to the sum of \$100 for each package.

1. Both the District Court and the Court of Appeals held the company to be liable under section 1 of the Harter Act, of February 13, 1893, c. 105, 27 Stat. 445, which provides "that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect," and this, notwithstanding the provision in the bill of lading that "in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

As the company did not appeal from this decree it must be regarded as acquiescing in the justice of such decree to the

Opinion of the Court.

amount therein awarded to the libellant; but as we should not make a further decree against the company for the amount now claimed by the libellant in excess of \$100 per package, if we were satisfied that the company was not liable at all, we have thought it best to consider whether the courts below were correct in their construction of the Harter Act.

It may well be questioned whether the provision "that in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination" has any application to a case where the goods were not placed in the proper compartment when stowed on board the vessel, and for which it appears no search was made upon the arrival at Savanilla, notwithstanding the fact that a bill of lading had been given for them and their shipment had been entered upon the manifest or other "cargo books" of the steamer. It appears that after leaving Savanilla the purser discovered that these goods had not been "tallied out" on the cargo books for that port, and he at once made search for them, and found them stowed with the Carthagena cargo.

It was clearly the duty of the master of the vessel before leaving Savanilla to examine the manifests or other memoranda of the vessel to ascertain whether the portion of the cargo consigned to that place had been delivered, and if not, to search for the missing consignment before leaving the port. His failure to do this was obviously a breach of his general obligation to deliver his cargo to its consignee, and it is exceedingly doubtful whether, even in the absence of the Harter Act, the provision in the bill of lading would have excused him. But as the stipulation in the bill of lading was one which the Harter Act prohibited, it is only necessary to refer to this act to hold the company chargeable with negligence. Regard may doubtless be had to the custom of the port as to what shall be termed a proper delivery with respect to the time and manner of such delivery, but a failure to deliver at all was negligence. No such want of delivery can be excused under the terms either of the first or second section of the Harter Act. Not only was there negligence in failing to examine the ship's papers to ascertain what goods were consigned to Sava-

Opinion of the Court.

nilla, but there was also negligence in stowing such goods under that portion of the cargo destined for Carthagena, and thus concealing them from observation. If these goods were the last received by the vessel before her departure from New York, they would naturally have occupied a position which would have called attention to them upon arrival at the first port of destination, but they were so concealed beneath the goods consigned to another port that they were not discovered until after the vessel had left Savanilla.

The words "cannot be found" would seem to apply to a case where the goods had been misplaced, and an effort had been made to find them which had proven unsuccessful, and not to a case where no attempt whatever was made to deliver them. But however this may be, we are clearly of opinion that the provisions of section one of the Harter Act supersede and override this stipulation in the bill of lading, particularly as it is expressly provided that the agreement was "made with reference to, and subject to the provisions of the United States carriers' act, approved February 13, 1893." (Harter Act.) The first section of the act is cited above, but the second section further provides "that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement . . . whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in anywise be lessened, weakened or avoided."

It is to be noticed that by the first section the carrier shall not be "relieved from liability" for loss or damage arising from negligence in the proper stowage or proper delivery of the goods, while by the second section the carrier shall not insert any covenant or agreement in the bill of lading whereby the obligations of the carrier to carefully stow and properly deliver the cargo shall be "lessened, weakened or avoided." These two sections, in their general purport, so far as respects the care and delivery of the cargo, are not essentially different,

Opinion of the Court.

although it is possible that a somewhat ampler measure of liability was intended under the second section, which denounces any covenant whereby the obligations of the ship to properly deliver the cargo shall in anywise be lessened, weakened or avoided. As the negligence of the respondent in this connection was clearly proven, there can be no doubt of its liability under either of these sections of the Harter Act.

2. The alleged limitation of respondent's liability to the sum of \$100 per package depends upon that clause of the bill of lading which declares "that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." Respondent insists that the words of this clause, "which are above the value of \$100 per package," should be read as limiting its liability to \$100 per package, and should be construed as if the words used were "beyond the sum or value of \$100 per package." The courts below agreed in putting this interpretation upon it. Acting upon this view, it was held that the liability of the respondent was limited to \$100 per package, following in this particular the rulings of this court in *Railroad Company v. Fraloff*, 100 U. S. 24, 27, and *Hart v. Pennsylvania Railroad*, 112 U. S. 331, and the principle announced in *Magnin v. Dinsmore*, 56 N. Y. 168; *S.C.* 62 N. Y. 35; 70 N. Y. 410; *Westcott v. Fargo*, 61 N. Y. 542, and *Graves v. Lake Shore & Mich. Southern Railroad*, 137 Mass. 33. In this last case the rule obtaining in this court is adopted to its full extent by the Supreme Judicial Court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing

Opinion of the Court.

a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. See also *Ballou v. Earle*, 17 R. I. 441; *Richmond & Danville Railroad v. Payne*, 86 Virginia, 481; *J. J. Douglas Company v. Minnesota Transportation Co.*, 62 Minnesota, 288.

We are, however, not content with the construction put upon the contract by the courts below. Whether the limitation of liability to goods above the value of \$100 per package applies to "gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks," as well as to goods of other descriptions, may admit of some doubt, in view of the fact that by Rev. Stat. § 4281 the vessel and her owners would not be liable for such articles at all, unless specifically mentioned at a valuation agreed upon. This stipulation in the bill of lading having been inserted by the ship owner for its own benefit, could scarcely have been intended to enlarge its statutory liability, and the more reasonable interpretation would seem to be that the company was not intended to be held liable at all for these articles. But whether this be so or not, the stipulation may be read as if those words were omitted, namely, that the carrier shall not be liable for goods of any description "which are above the value of \$100 per package." The plain and unequivocal meaning of these words is that the carrier shall not be liable to any amount for goods exceeding in value \$100 per package. It is true that contracts for the carriage of goods by water, as well as by land, frequently contain a provision limiting the liability of the carrier to a certain amount, usually \$100 per package, and it was apparently in view of this custom that the courts below gave a like interpretation to the words of this stipulation. But this certainly does violence to its language. If it had been intended to so limit the respondent's liability, it would have been easy to say so, and the very fact that different language was used from that ordinarily employed indicates a desire on the part of the carrier to limit his liability to goods which are of less value than \$100 per package. It is possible that the draughtsman of this bill of

Opinion of the Court.

lading may have had the more common limitation in his mind, and may have intended that the carrier should incur a liability upon all goods to the extent of \$100 per package, but he certainly was unfortunate in the language he chose for that purpose. If, as we have already intimated, the carrier intended to exempt itself from all liability for the articles specifically mentioned in this clause, it is scarcely to be supposed that it intended to make itself liable to the amount of \$100 for goods of other descriptions, which were above that value per package. It was probably intended that the carrier should incur no liability whatever for the value of the articles specifically mentioned, as well as for all other goods exceeding the value of \$100 per package, while it remained liable to the full amount for goods of other descriptions which were of less value.

It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage. Clark on Contracts, p. 593.

It was said of penal statutes by Mr. Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95, that "the intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words,

Opinion of the Court.

there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

Similar language was used by Mr. Justice Swayne in *United States v. Hartwell*, 6 Wall. 385, 396: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all." See also Endlich on the Interpretation of Statutes, § 4.

In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding \$100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. If the language had been ambiguous we might have given it the construction contended for, which probably conforms more nearly to the clause ordinarily inserted in such cases, but such language is too clear to admit of a doubt of the real meaning. The clause in question seems to have been taken from the English carriers' act, 11 Geo. IV, and 1 Wm. IV, c. 68, which received a construction similar to that we have given to it in *Morrill v. Northeastern Railway Co.*, 1 Q. B. D. 302.

Opinion of the Court.

Under this interpretation there is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of \$100 per package. Such exemption is not only prohibited by the Harter Act, but is held to be invalid in a series of cases in this court, culminating in *Chicago, Milwaukee &c. Railway v. Solan*, 169 U. S. 133, 135, wherein it was said that "any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or servants, is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle upon which the law of common carriers was established." The difficulty is not removed by the fact that the carrier may render itself liable for these goods, if "bills of lading are signed therefor, with the value therein expressed and a special agreement is made." This would enable the carrier to do, as was done in this case—give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter Act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid.

The decree of the District Court is therefore reversed, and the case remanded to that court with directions to assess the value of the libellant's goods, and to enter a decree in conformity with the opinion of this court.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE BREWER dissented.